85-1593

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1985

COUGHLIN, JAMES and
COUGHLIN, PATRICIA, his wife,
Petitioner

v.

WESTINGHOUSE BROADCASTING AND CABLE INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Whether a media defendant, based on a videotape of an official report book in a police officer's hand, may falsely and without any actual proof from any source imagine and then broadcast the gravely serious charge that the officer received an envelope impliedly containing an illegal payoff and yet routinely obtain a summary judgment based on *New York Times Co. v. Sullivan*.

Whether the "actual malice" standard of *New York Times Co. v. Sullivan*, as applied by the courts below, was so inexorably weighted against the public libel plaintiff that it has become a mere token for routinely disregarding or minimizing genuine circumstantial evidence of the knowing or reckless disregard of falsity, thereby depriving the libel plaintiff of his right to a jury trial.

Whether, in a libel suit burdened by *New York Times*, the application of the Pennsylvania Shield Law, preventing discovery of *any* information in the possession of a media defendant, violates the Fourteenth Amendment by destroying a libel plaintiff's property and liberty interest in reputation, which interest is specifically vested by virtue of the Pennsylvania Constitution.

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REFERENCE TO OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 780 F.2d 340 (3d Cir. 1985).

The Opinion of the District Court is reported at 603 F. Supp. 377 (E.D. Pa. 1985).

STATEMENT OF GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 30, 1985.

This Honorable Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. section 1254(1).

The jurisdiction of the District Court was based on the removal provision of 28 U.S.C. section 1441, based on diversity of citizenship.

STATUTE IN QUESTION

The Pennsylvania Shield Law, 42 Pa. C.S.A. section 5942(a), provides as follows:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

STATEMENT OF THE CASE

Introduction

This public official defamation case arose as the result of a television news special which was broadcast on February 17, 1982, by KYW-TV, a local Philadelphia television station owned by Westinghouse Broadcasting and Cable, Inc. The report, which was prepared by the so-called "I-Team," was entitled "After Hours on American Street."[1] It focused on the Ukranian American Club, a private club licensed under state law to serve alcoholic beverages after the standard closing time of public bars. The entire thrust of the program was aimed at showing that the club, about which neighbors complained bitterly, was operating beyond its own closing time and other legal limits. The inescapable conclusion driven home by Westinghouse was that this was

1. KYW-TV is owned by respondent Westinghouse Broadcasting and Cable Inc., hereinafter referred to as "Westinghouse."

the result of corruption in the Philadelphia Police Department and the Liquor Control Board.

The climax of the broadcast was a cleverly placed section of videotape showing Officer James Coughlin emerging from the club, allegedly at 4:18 a.m. on October 11, 1981. Having harangued Officer Coughlin for not wearing his cap and nightstick, the broadcaster cued the public that what was to follow was "the most suspicious police activity we saw on American Street." Officer Coughlin was then shown in a freeze frame with a circle around an object in his hand. The audio portion of the program at that point reported, "Well, the only paperwork we saw him doing was *carrying this envelope* out of the Club less than a minute after he went in." (Emphasis added).[2] The inescapable conclusion so carefully packaged and so powerfully delivered to the Philadelphia public was that Officer Coughlin had gone to the Ukranian American Club on a clandestine and illegal mission to pick up a payoff which had bought the cooperation of the police. In the context of a program which constantly repeated the suggestion of corruption, "questionable activity," and "suspicious activity," the broadcast unmistakably accused Officer Coughlin of the most base and disreputable illegal acts.[3]

The utter falsity of the attack on Officer Coughlin is so clear that it was not even an issue in this case. The District Court itself has acknowledged that the "defendant has not seriously challenged the plaintiff's explanation for the events of October 11, 1981." (A-38).

As demonstrated in the detailed recitation below, Officer Coughlin, a rookie officer fresh out of the academy, was not a suspicious underworld figure involved in illegal exploits. He was an inexperienced policeman performing some job functions for the very first time on the night he was videotaped by the hidden camera crew. While Mr. Coughlin may not have worn his cap or nightstick in performing the appointed duty of checking to see

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2. The show had previously stated that Coughlin had told police radio to "hold him out at headquarters for paperwork," and had not reported himself "back out on the street."

3. The District Court in fact determined that the broadcast "is clearly capable of a defamatory meaning" and that is not an issue for review. (A-37)

that the Ukranian American Club was closed, there was never any basis for the vicious and astonishing accusation of illegal conduct levelled against him.[4] The record is absolutely clear: Officer Coughlin had nothing whatsoever to do with any of the claimed problems associated with the Ukranian American Club or with alleged misfeasance, malfeasance or misconduct of any kind whatsoever. He was victimized purely and simply because of the uniform he wore and because his duties happened to place him in the line of a camera whose focus proved to be as destructive to him as the sights of any weapon.

The only evidence which can be found in the entire record of this case shows that the so-called "envelope" which Westinghouse identified was actually the officer's "48 book" containing official incident report forms. Even an FBI analysis of the videotape could not corroborate the extraordinary accusation that Officer Coughlin had an envelope. Conveniently, Westinghouse said it did not have videotape of Officer Coughlin going *into* the club. Such a tape would have shown him carrying his report book when he entered the club, not taking an "envelope" from the club. Despite the malignant fiction which has so unfairly branded Officer Coughlin, the courts below have turned a cold shoulder to all his efforts to restore his reputation.

The District Court confessed its serious doubt in granting a summary judgment to the defendant. It acknowledged, for instance, that "[a]n issue . . . exists as to whether the I-Team, with a minimum of effort, could have discovered the truth." (A-42). Yet, despite the strong circumstantial evidence showing that Westinghouse indulged in such vicious accusations without any support — save that it was predisposed to seize upon the worst imaginable conclusion — the District Court granted summary judgment for the defendant based on a belief that the evidence of actual malice was not enough. Stating that even indifference to the truth is "insufficient," (A-40), the District Court expressed its rigid view that the plaintiff's evidence did

4. The broadcast never even explained to the public that its accusation was premised completely upon the videotape, rather than some other evidence. The charge that Officer Coughlin was holding an envelope was simply stated as fact while the videotape was being shown.

not create a factual issue whether the defendant "entertained serious doubts," (A-40), or whether "only a reckless man would have put [the statements] in circulation." (A-41).

The error in granting summary judgment despite the existence of genuine evidence of actual malice was severely compounded by the court's refusal, based on the Pennsylvania Shield Law, to allow the plaintiff *any* discovery of film outtakes, of facts and sources supporting published statements, of facts detailing any steps taken to verify charges, or of evidence of the editorial thought process in producing the report. These traditional avenues of discovery were simply cut off. The media defendant was thus giver license to withhold any evidence which might show its knowing or reckless disregard of the truth. At the same time, all the outward manifestations of defendant's disregard for the truth were completely discounted by the District Court and Court of Appeals, including evidence of: the defendant's frustration with and pre-existing hostility toward the Philadelphia Police, the failure to interview even one other patrol officer despite a leisurely lack of time pressure before broadcast, the penchant to assume the worst at every opportunity, the use of an ambush interview with cameras rolling in front of the libel victim's home as a means of goading him into refusing to comment, the refusal to this very day to retract the libel despite the undisputed falsity of the defamation, and, most importantly, the sensationalized placement of a section of videotape showing completely innocent activity in such a way as to make it appear to the public that a crime was being committed.

Officer Coughlin was a random victim of actual malice whose reputation was sacrificed for no better reason than that he walked in front of a camera's jaundiced eye. If this libel is to be placed beyond legal reproach by virtue of *New York Times*, then any videotape of a public official performing any innocent activity may spawn the most alarming accusations of imagined illegal behavior and yet allow no legal recourse. It is submitted that the *New York Times* rule never contemplated such an abdication of legal accountability.

Because the facts are central to the error of the District Court and the Court of Appeals below, it is necessary to present the evidence in detail.

Officer Coughlin's Activities on October 11, 1981

James Coughlin was a high school dropout who received his high school equivalency diploma in the United States Army while he was serving as a truck driver in Vietnam. Upon his honorable discharge from the United States Army in February, 1972, he worked at various jobs, usually driving trucks. He was appointed to the Philadelphia Police Academy on May 18, 1981 and spent sixteen (16) weeks there. Upon his graduation, Officer Coughlin was assigned to the Third Police District in South Philadelphia under the supervision of Captain Russell Taylor. During the latter part of September and the early part of October of 1981, Officer Coughlin was receiving "on the job" training riding in police vehicles with experienced officers who were instructing him in various activities that would be required in the Third District. During this time he never actually operated a police vehicle, nor did he do any of the patrols by himself.

On October 5, 1981, Officer Coughlin's father died suddenly and James was given six days of funeral leave. When he returned to active duty he was assigned to the midnight to 8:00 a.m. shift beginning on October 10th at midnight. *It was to be his very first night on patrol alone*. He was assigned to Car 35 which generally covered the "C sector" of the Third District.

The first significant event of the evening for Officer Coughlin, one which was videotaped by Westinghouse, was his response to a report of a vandalism incident at the Ukranian American Club in C sector. Officer Coughlin had been ordered by radio to report to the club. He did so and was filmed talking briefly to the club's steward who was giving a report of the vandalism. As the tape clearly shows, paint had been splashed on the building and various insulting epithets had been painted on it.

According to Officer Coughlin, he then spent a long time sitting in his car filling out what is known as a "75-48" or incident report. This was the first such report that he had ever filled out.

Understandably, he was a little unsure how to do it. Finally, a police lieutenant pulled up in another vehicle and asked what Officer Coughlin was doing. Coughlin showed the "48" to the lieutenant and asked him if he thought it was all right. The lieutenant said that it seemed to be in order and that he should proceed with his duties. The videotape does not show Coughlin writing up the "48" or talking to another officer.

The tape does, however, show Officer Coughlin attempting to start the patrol car. Apparently because Coughlin fumbled with his keys, the narrator said that the officer in the car did not even appear to be Officer Coughlin, clearly implying that someone was "ghosting" the car; that is, that Coughlin pretended to be in the car, and wrote up his patrol log as if he was in the car, but was secretly somewhere else. When questioned, none of the Westinghouse employees could give any specific reason why this did not appear to be Coughlin. Officer Coughlin, while embarrassed that he fumbled with the keys, has explained that he was indeed the person in the car, as any complete videotaping and accurate viewing would have shown.

According to Officer Coughlin, the next significant event that evening occurred when he was called to Delaware and Christian Streets in Philadelphia by a Sargeant Nichols. The Sergeant had two flat tires at that location and had called car 34, driven that night by an Officer O'Hara. O'Hara was to "sit on the [disabled] car" while he, Sergeant Nichols, used car 34 for his patrol. O'Hara was to wait until the repair service from the Police Department came and fixed the tires. Coughlin was told that because of this he would have to perform the "club checks" for A and B sectors of the Third District.

Coughlin had never performed a "club check" before, nor did he know what it was. Officer O'Hara therefore explained on the spot what Coughlin should do. He told Coughlin that he was supposed to go to the club around 3:30 a.m., estimate the number of people in the club, make a notation on the "48," and make sure that everyone had left the club and that it was closed by 4:00 a.m. O'Hara then gave him five "48" forms which O'Hara had already filled out except for the time-out, time-in, and detail boxes. In essence, O'Hara said that having the forms would make

it simple. Coughlin just had to go to the addresses of the five clubs on the five "48" forms.

Officer Coughlin testified that he then checked out the clubs in the A and B sectors and went to headquarters to turn in the club checks. He duly informed the police radio that he was out of service and turning in his paperwork at headquarters. Coughlin testified that someone at Police Headquarters in the Third District then told him that because he was in the 35 car, he was also supposed to perform the club checks for C sector as well as A and B. Coughlin testified that the unidentified person at headquarters said that perhaps someone else had already checked out the clubs in C sector, but that he, Coughlin, should make sure. Coughlin then had to ascertain where these clubs were and put himself back in service.

When he arrived on American Street, he saw another police car leaving the club. At that point he wondered whether he should do the club check or find out from the other officer whether it had already been done. At first he pulled forward, then backed up and finally decided to pursue the other officer. He was unable to catch the car and therefore went back to see if the club had been closed. He pulled up in front of the club, double parked, and grabbed a "48" book from the seat of his car. He walked down the steps to the club with the "48" book, knocked on the door, and was told that another police officer had already done the club check. He then went back to his car and returned to his patrol.

That particular night never came to his mind again until sometime late in January, 1982, when he was told to report to the Internal Affairs Bureau, which investigates illegal police activity. He was told that he would be questioned about his club check at the Ukranian American Club on the night of October 11, 1981. On his first trip, however, Coughlin was told that he could go home. A few days later, sometime in early February, he was told to report to the Internal Affairs Bureau and see Staff Inspector Kelly. When Staff Inspector Kelly came into the room where

Coughlin was seated, he showed Coughlin his patrol log for October 11, 1981, and a 75-48 incident report concerning the vandalism at the Ukranian American Club. Kelly asked if he remembered them and Coughlin said he did.

Coughlin was then told by Kelly that he, Coughlin, had been accused of going into the club at 4:19 a.m., leaving with an envelope, getting into his car, and leaving the scene. Before Coughlin could say anything in response, he was officially read his "Miranda" warnings by Staff Inspector Kelly. Coughlin then said he did not wish to make a statement at that time and called the Fraternal Order of Police. A lawyer came down to the Internal Affairs Bureau but no further interview was conducted on that day.

Coughlin had heard rumors that the I-Team from Westinghouse (KYW-TV) generated reports of police activities at the Ukranian American Club, but he was not really sure what was going on, nor was he positive that the I-Team was his accuser. On February 10, 1982, however, when he was returning from work, he was approached outside his house by two men. One of them had what was obviously a television camera. The camera was running. The other man had a microphone in his hand. He stuck it in front of Coughlin's face, asking him if he had reported to headquarters to do paperwork on October 11th, four months before. Coughlin testified at his deposition that he asked them to turn the cameras off, but that they refused to do so. Coughlin also testified that he was very upset by this experience. He refused to be questioned under these circumstances. This was the sole "attempt" made by defendant to learn Officer Coughlin's explanation.

The next week an advertising and promotional campaign proclaimed that the special "I-Team" report entitled "After Hours on American Street" would appear and would show how the police had done nothing to stop the illegal activities in connection with an "after hours" club. That report was later broadcast to the expectant Philadelphia public. The very center of focus was, of course, the videotape of Officer Coughlin who was held out to the public by name for ridicule and disparagement.

Captain Russell Taylor testified at his deposition that the day after the program was on the air he called Officer Coughlin into his office and asked him what he had in his hand. Coughlin told Captain Taylor that it was a "48" book and that certainly he had not left the club with an envelope in his hand.

On March 22, 1982, Officer Coughlin had his formal interview at the Internal Affairs Bureau. He denied having an envelope and gave the explanation set forth above. No charges were ever brought against Officer Coughlin as a result of the Internal Affairs investigation. The matter is an official dead letter, although the stain from the Westinghouse accusation remains alive.

The Westinghouse "Investigation"

Westinghouse allegedly became interested in the Ukranian American Club late in 1980 when someone from KYW-TV received a telephone call from a neighbor of that club. That individual had recently moved next door to the club and told Westinghouse that she had been keeping a record of police activity on her street for the last few months. Basically, she said that she thought the police activity there was suspicious. As the managing director of the Westinghouse KYW-TV I-Team testified, there had been previous interest in exposing "phony clubs" and so a reporter and a cameraman were dispatched to the street to check out the club. It is abundantly clear that Westinghouse went to American Street with the expectation and for the specific purpose of finding evidence of police corruption.

Early in 1981, the reporter and cameraman apparently spent one night observing the scene from the neighbor's house. They found, however, that they could not photograph the club nor adequately observe the police activity from that location. Therefore, they rented a van. The cameraman stayed in the van while the reporter stayed in the neighbor's house.

That evening the police received an anonymous telephone call from a woman, saying that a woman had been dragged screaming into a white van located on American Street. Half a dozen police cars, alerted by radio, rushed to the scene. The

videotape of this incident, as well as the police radio report itself, clearly demonstrate that the police were and had reason to be extremely concerned about the telephone call and about locating the woman in the van. The reporter in the neighbor's house, having observed the police arrive, rushed down to the van and began demanding that the police cease their activities.[5] The police insisted upon being allowed entry into the van to check out the report. Having satisfied themselves that there was no crime, the police left. Westinghouse felt its cover had been destroyed, probably by the police. A complaint against the police was filed alleging that they had acted improperly. The station's General Manager believed that his reporters' First Amendment rights had been violated, and Westinghouse was not assuaged by the Police Commissioner's statement that the police had acted properly.

In October, 1982, Westinghouse began videotaping from another location. It did so on three separate nights. It was during the early morning hours of October 11, 1981, that they compiled their videotape of Officer Coughlin, who indisputably had no involvement with any of the matters which Westinghouse regarded so suspiciously and who had only assumed non-training duties on that very evening. Seizing upon the most disparaging possible interpretation of events which were perfectly innocent in themselves, the defendant determined to charge Officer Coughlin with reprehensible crimes *because he was filmed with a paper in his hand* — his 48 book. Westinghouse never obtained one bit of evidence from anyone or anywhere which supported the proposition that Officer Coughlin emerged from the Ukranian American Club with an envelope. All it had was its own sinister imagination fueled by months of frustrated suspicions about the police. Coughlin became the scapegoat for those frustrations.

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5. Interestingly, the same reporter and camera man had been involved in what has been called the Crefeld Street incident. Sometime prior to February of 1981, Westinghouse (KYW-TV) had been doing an investigation into police protection surrounding former Mayor Rizzo's house. Mayor Rizzo, having spotted their van, allegedly went into a rage and smashed the television camera. The police allegedly did nothing to restrain the Mayor. This incident obviously influenced the reporters' negative attitude toward the police.

Although given permission by the Police Department to request interviews with the police officers who patrolled the relevant sectors, Westinghouse made no attempt to contact any of the other patrol officers. In contacting Officer Coughlin, moreover, Westinghouse did not afford him treatment comparable to that given in interviewing the persons who had been campaigning against the club. Westinghouse, for example, chose not to call him on the telephone, show him the videotape, or do anything else that might have enabled him to respond intelligently to its accusations or to present his side of the story. Rather, it confronted him on the doorsteps of his home with a microphone and a running camera and accused him of criminal activity. This evidenced a state of mind truly anxious to feed the fires of a sensationalized story. Westinghouse created an atmosphere in which a response was simply impossible. It then showed the tape of this ambush in order to portray the plaintiff as guilty and evasive.

Even when the facts on Officer Coughlin were forced to its attention after the sensationalized story was broadcast, Westinghouse still made no attempt to verify that information or follow up on it in any way. At a talk show on Friday, February 20, 1982, Tom Garvey, the president of the Fraternal Order of Police, did state the facts surrounding the incident. (He had carefully verified these facts with Officer Coughlin before appearing on the program.) Westinghouse, having accused this officer of a very serious crime, felt no responsibility to check out or publicize the true facts presented to them. It chose instead to let its scathing story stand and only to issue the hollow promise to "follow up" on the situation on American Street, to follow the story very carefully and let the public know what eventually happened. None of its "follow-ups" provided the true explanation for Officer Coughlin's behavior.

These facts and circumstances supply ample evidence from which a jury could infer that the defendant acted with actual malice in misrepresenting the videotape of Officer Coughlin's innocent activity. The defendant went to American Street with

a purpose to find police corruption. Having found none, it conjured up a serious crime from its damning presentation of non-criminal conduct and gravely harmed the reputation of an innocent man who randomly fell prey to their trap.

In the effort to shield itself from any and all accountability, Westinghouse was additionally aided by the ability to pick and choose what information and evidence it produced in discovery. In this regard, it is indeed tragically ironic that Westinghouse has claimed that for some reason it did not happen to videotape Officer Coughlin's *entry* into the Ukranian American Club on the morning of October 11. If it had, that videotape would have shown him carrying his "48 book" *into* the club as well as out of the club, and *not* picking up an envelope. In tandem with its reliance on the actual malice standard, as understood in the Third Circuit Court, Westinghouse has thus successfully employed the Pennsylvania Shield Law to prevent discovery of any of the outtakes which were not actually broadcast. Officer Coughlin and the people of Philadelphia will never know if this videotape exists and will only be left to wonder why such a stakeout effort would have been so selective in videotaping only those acts which it could interpret as corruption, and not videotaping activity which would have disposed of that false accusation.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. The Wooden Application of the Times Standard so as to Discredit Substantial Circumstantial Evidence of Actual Malice Deprived the Plaintiff of His Right to a Jury Trial and Necessitates the Reconsideration of the Standard Itself

The actual malice standard inaugurated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was a judicial effort to prevent an excessive chill upon the publication of truthful, constitutionally protected speech. A sibling of the prior restraint doctrine, the actual malice standard was intended to quell the unbridled use of the common law defamation suit, a form of post-publication restraint. It was believed that if libel verdicts could

be rendered without any fault at all, the foreknowledge of that possibility might deter some publishers from printing or broadcasting what they legitimately believed was true. *Times* came into being to provide the media with a limited amount of breathing space in the event they inadvertently crossed into the realm of falsehood, a region not directly protected by the first amendment. *Id.* at 271-72; *see, e.g., Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)("[l]ibelous utterances not . . . within the area of constitutionally protected speech").

As related by Justice White in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985), however, *Times* has proven to be "severe overkill." *Id.* at 2952. The standard has been taken too far. The unwitting victims have consistently been the interest in truth and the high value of reputation in a civilized society. This Honorable Court surely did not mean in *New York Times* to make the actual malice standard a journalistic model for good reporting. Nevertheless, the creation and subsequent evolution of the actual malice standard has alarmingly insulated media defendants from the effects of journalistic laxity. As stated by Justice White:

> The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Id. at 2951; *accord, id.* at 2948 (Burger, C.J., concurring). No case better illustrates the very evils of which Justice White wrote than this case. The plaintiff, Officer Coughlin, was judicially deprived of any opportunity to place his true evidence of actual malice before a jury. The *Times* standard itself was given absolute dominance, overshadowing even substantial evidence.

In the present case the District and Circuit Courts magnified the overkill of *Times* and even overrode the admonition in

Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979), that "[t]he proof of 'actual malice' calls a defendant's state of mind into question, *New York Times v. Sullivan*, . . . and does not lend itself to summary disposition." Although it is fundamental that the jury must determine the defendant's state of mind where, as here, the right to a jury trial has been exercised, the District Court invaded the jury's province by actually finding the facts against the plaintiff. It failed to recognize that its function was merely to determine whether evidence existed which, viewed as a whole, could permit a rational jury to conclude that the defendant recklessly disregarded the falsity of its defamation. The Court of Appeals for the Third Circuit then added its appellate imprimatur to this total disregard of the plaintiff's evidence.

Although any general survey of recent libel cases will yield occasional instances in which the actual malice standard has been satisfied by circumstantial evidence of the defendant's state of mind, *e.g.*, *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir.), *opinion vacated*, 763 F.2d 1472 (D.C. Cir. 1985); *Golden Bear v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983); *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983), the vast majority of cases, both state and federal, have held that the standard has not been met. The present case demonstrates how the *Times* standard has sometimes been applied as a total bar to recovery. The standard has not only been interpreted as a requirement that there be some evidence of actual malice to support a jury's verdict, but it has been treated as a requirement that the courts themselves must be persuaded as factfinders that actual malice exists before the jury will ever be summoned. This erroneous application of *Times* goes far beyond the instruction in *Bose Corp. v. Consumers Union of United States*, 104 S.Ct. 1949 (1984), that the appellate courts have an independent duty to see that there is evidence sufficient to allow a finding of actual malice. The courts below substituted the judge for the jury, even in the absence of a trial record, in finally weighing the evidence against the plaintiff.

A. Evidence of Defendant's Hostility Toward Philadelphia Police Was Probative of a State of Mind Susceptible to Knowing or Reckless Disregard of Falsity

The District Court in this case viewed in isolation each piece of circumstancial evidence of the defendant's state of mind and rejected it on qualitative grounds. It discarded, for instance, the evidence of the defendant's hostility toward the police and the predisposition to find and proclaim corruption. The Court stated flatly that "malice cannot be inferred from a reporter's hostility toward or bias against a subject." (A-40). While this evidence may not be dispositive, many authorities have properly recognized that animosity or ill will are probative of a state of mind susceptible or receptive to falsehood. *E.g., Goldwater v. Ginsberg*, 414 F.2d 324, 328-29, 337, 340, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 562, 372 N.E.2d 1211, 1221 (1978); *Sprouse v. Clay Communications, Inc.*, 158 W.Va. 427, 211 S.E.2d 674, 688, *cert. denied*, 423 U.S. 882 (1975). The District Court and the Court of Appeals in the present case, however, eliminated from any consideration this valid avenue of circumstantial proof, contrary to the teaching of a host of other cases.

B. Evidence of Improper Investigation Despite the Awareness of the Devastating Nature of the Criminal Accusations is Probative of the Knowing or Reckless Disregard of Falsity

The defendant further knew that by singling Officer Coughlin out as the epitome of corruption, the broadcast would have a devastating impact on him. "Knowledge of the harm likely to follow publication of a story is relevant to whether it was published with actual malice." *Tavoulareas v. Piro*, 759 F.2d 90, 131 (D.C. Cir.) (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J. concurring)), *opinion vacated*, 763 F.2d 1472, 1481 (D.C. Cir. 1985).

Despite this certain knowledge of the serious harm which would befall the plaintiff, the defendant conducted no investigation of his alleged involvement in any of the imagined wrongdoing, except for seizing upon meaningless technicalities such as the fact that he was not wearing his cap or that he returned back to the street after going to headquarters for paperwork. The failure to verify what was or was not in Officer Coughlin's hand on October 11, 1982; the failure to interview any police patrol officer (apart from the ambush interview directed against Coughlin himself); the failure to inform the public that its "year long" investigation was in reality three days of apparently highly selective videotaping; and the failure subsequently to be responsive to the explanation of the facts of Officer Coughlin's innocent activities — all combined to produce the District Court's just criticism that the reporters showed *"little concern for the truth."* (A-39) (emphasis added). Each of these items is a proper part of plaintiff's proof of actual malice. And yet the District Court, viewing each in isolation, totally rejected the evidence by saying that "evidence of failure to investigate, even if it establishes that defendant was indifferent to the truth of an allegedly defamatory communication, is also insuffficent to show that defendant acted with malice." (A-40).

C. The Absence of Time Pressures Was, Viewed In the Totality of the Evidence, Probative of the Defendant's Knowing or Reckless Disregard of Falsity

The plaintiff's evidence also showed that the subject of the defamatory broadcast was not "hot news." It took four leisurely months for Westinghouse (KYW-TV) to air the broadcast of their October, 1981 videotaping. This fact was relevant in showing reckless disregard of falsity even if it is not sufficient standing alone to do so. As stated in *Tavoulareas, supra*, 759 F.2d at 131, "falsehoods uttered at leisure are more likely to be deliberate than those published in haste." *See Carson v. Allied News Co.*, 529 F.2d 206, 211 (7th Cir. 1976) (grant of summary judgment reversed); *Vandenberg v. Newsweek, Inc.*, 507 F.2d 1024, 1026

(5th Cir. 1975). Nevertheless, the District Court, with the approval of the Court of Appeals, also flatly and erroneously rejected this substantial proof as a matter of law in stating that "[t]he fact that the broadcast was not 'hot news' and defendant had time to investigate is not sufficient to demonstrate the existence of malice." (A-43).

D. The Invariable Tactic of Speculating and Inferring the Most Damaging Possible Conclusions Against Officer Coughlin Was Probative of Defendant's Knowing or Reckless Disregard of the Truth

The District Court likewise paid no attention to Officer Coughlin's proof that the conclusions drawn by the Westinghouse I-Team in the broadcast were invariably the most injurious speculations imaginable. By taking this approach the defendant created a suspicious and ugly image of criminal behavior out of the innocent activity of an inexperienced officer. When, for instance, it observed an embarrassed Coughlin fumbling with keys in car 35, it falsely concluded that a different officer was improperly in the patrol car, that some sinister switch had been pulled, and that logs had been deliberately falsified to cover up criminal activity. This was based totally on the most disparaging and hostile surmise. Because Officer Coughlin radioed that he was going to headquarters for paperwork on the checks of the clubs in sectors A and B, defendant interpreted his later appearance in sector C as a deliberate ruse instead of a last minute directive to an inexperienced officer. When it videotaped Coughlin with what all the evidence shows was his official incident book, it leaped to the damning conclusion that he had picked up an envelope which contained corrupt payoff money. This regular course of interpreting item after item of innocent evidence in the harshest and most accusatory light is directly relevant to proving actual malice.

In *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981), the court was presented with a memorandum revealing that a reporter was not certain who had cashed stolen stocks. One possibility was that the stocks were

cashed by Rebozo, a close friend of former President Nixon. The reporter charged in his article, however, that it *was* Rebozo. The Court stated:

> This memorandum, plus the fact that Kessler [the reporter] resolved the uncertainty expressed in it in such a way as to cast plaintiff Rebozo in the worst possible light and to make for Kessler a front page story of an episode which otherwise might not have commanded any significant attention, when taken in a light most favorable to Rebozo, could amount to evidence of the reporter's reckless disregard for the truth or falsity of the assertion. . . .

Id. at 382.

In the present case, Westinghouse took a film of an officer with his incident book and inflated that into the sensationalized climax of a television special by suggesting to the public that it was a payoff envelope. There never was any substantiation of that defamatory charge, before or after the broadcast. All the evidence shows that it was absolutely false. The penchant for assuming the very worst time after time has a significant bearing in proving actual malice, especially when it is considered together with the one-sided and superficial investigation, the lack of any time pressure, the reporters' preexisting hostility towards police, and the defendant's certain knowledge of the devastating effect from singling out Officer Coughlin. All of these circumstances combine with the collection of indisputable falsehoods in the broadcast to generate an abundance of evidence which, taken most favorably to Coughlin as plaintiff, would at least support submitting the issue of reckless disregard to the jury.

E. The Defendant's Deliberate Attempt to Silence the Plaintiff by Setting Up and Videotaping an Ambush Interview in Front of His House as the One and Only Method of Interviewing Him is Probative Evidence of Actual Malice

Despite the seriousness of the charges which defendant intended to publish and despite the ease with which its sinister

suspicions could have been resolved, it undertook to arrange a camera-on ambush interview with the plaintiff as he returned to his home one morning following night duty. The defendant's camera showed that the plaintiff was confused by this aggressive and accusatory assault. Naturally he would not be interviewed in this atmosphere. Defendant, of course, broadcast the entire befuddling and pathetic episode as if it were further proof with which to convict this innocent man who at no time prior to the ambush interview had ever refused to be interviewed. This conduct also revealed defendant's prepublication state of mind by corroborating its unwillingness to afford the target of a serious libel any genuine opportunity to explain himself. This ambush tactic was the defendant's first and only choice in contacting Officer Coughlin. It was a choice which from the outset was calculated to produce no information which could disturb the sensationalized attack which Westinghouse was already determined to broadcast.

F. The Defendant's Refusal to Retract Even After Being Advised of its Errors is Probative of a Knowing or Reckless Disregard of Falsity

The defendant's accusations are indisputably false. No evidence supports the payoff charge. Nevertheless, there has never been a retraction, even after the District Court itself stated that "[a]n issue . . . exists as to whether the I-Team, with a minimum of effort, could have discovered the truth." (A-42). The lie uttered against James Coughlin has thus been etched in granite.

Numerous cases have logically and correctly held that a refusal by a media defendant to retract despite specific denials and refutations is itself relevant evidence of actual malice. *E.g.*, *Golden Bear Distribution Systems, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983); *Sharon v. Time, Inc.*, 599 F.Supp. 538, 581 (S.D.N.Y. 1984); *Church of Scientology v. Dell Publishing Co.*, 362 F.Supp. 767, 770 (N.D.Cal. 1973). The District Court and Court of Appeals for the Third Circuit, however, have disregarded this clear and poignant evidence.

G. Conclusion

In determining that the above evidence, combined with the flagrant and inexcusable mischaracterization of the videotape itself, was all insufficient to permit a finding of malice, the District Court and Court of Appeals deprived the plaintiff of his constitutional right to a jury trial. Rather than evaluate what a jury could find, the courts below credited the self-serving testimony of the individuals who produced the libels. Naturally, none admitted acting recklessly or being aware that the accusations were false. The District Court determined that "although they did not seriously explore other possible explanations for Coughlin's behavior, the conclusions which they drew based on their observations were reasonable." (A-41). In making and approving a finding of reasonableness, however, the lower courts abandoned their limited role in passing upon a summary judgment motion and instead credited the disputed evidence offered by Westinghouse in its own behalf. When the proper standard is applied, however, the cumulative impact of the evidence should be inescapably sufficient to preclude summary judgment even by the clear and convincing standard which the Court of Appeals evidently applied. The District Court and Court of Appeals failed to give the evidence its due and in effect created a standard which is insurmountable in the absence of a confession of guilt by the defendant. This error, and the confusion which it both reflects and promises to generate, must be corrected and the "actual malice" standard of Times reconsidered by this Honorable Court.

II. Because the Pennsylvania Constitution Vests a Right of Reputation in its Citizens, the Use of the Pennsylvania Shield Law to Prevent any Discovery From a Media Defendant in a Public Official Libel Suit Already Burdened by the Times Standard Violates the Fourteenth Amendment

Although the majority of the panel of the Third Circuit Court of Appeals gave scant weight in its per curiam opinion to plaintiff's arguments and evidence, the comprehensive concurring opinion of Judge Becker acknowledged the seriousness of

the constitutional issues created by the combined use of the Pennsylvania Shield Law, 42 Pa. C.S.A. §5942(a), and the *Times* actual malice standard. Judge Becker observed:

> It is hard not to sympathize with plaintiffs. The *New York Times* standard makes it hard enough for a public figure to win a libel suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media. (A-19).

Pointing out that the plaintiff's interest in reputation is not only "protected by the state constitution, but . . . has deep, philosophical foundations," (A-23), Judge Becker nevertheless explained that on balance victory was "not impossible" and therefore the due process clause was not impinged, (A-24). This conclusion was in error.

The Pennsylvania Constitution is a unique document, every bit as venerable in its history as the Constitution of the United States itself. In order to present the Petitioner's argument that the Pennsylvania Constitution vests in him a right of reputation which cannot under the fourteenth amendment be summarily denied, it is necessary to quote the pertinent provisions of the Pennsylvania Constitution.

Article I, Section 1 of the Pennsylvania Constitution provides as follows:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and *reputation*, and of pursuing their own happiness. [Emphasis added]

This provision owes its origin to the Constitution of 1790, where it appeared as Section 1 of Article IX. *The Proceedings Relative to Calling the Conventions of 1776 and 1790* at 161 (John S. Wrestling, Harrisburg, 1825) [hereinafter cited as *"Proceedings"*].

In raising reputation to the same high level of importance in the Pennsylvania Constitution as life, liberty, property and the pursuit of happiness, the framers of 1790 made a remarkable and clear departure from the language that appeared in the prior

Constitution of 1776 and in other contemporary documents circulating in the colonies. The 1776 Constitution did not enumerate reputation as one of the protected constitutional rights; it alluded only to the rights of "enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Ch. I, §1 (quoted in *Proceedings* at 55). This language paralleled that found in section 1 of the Virginia Bill of Rights of June 12, 1776. *H.S. Commager, Documents of American History* at 103 (8th ed. 1968) [hereinafter referred to as "*Documents*"]. The Declaration of Independence of July 4, 1776, itself referred only to "Life, Liberty, and the pursuit of Happiness." *Documents* at 100.[6]

The next provision of the Pennsylvania Constitution directly applicable here is Section 7 of Article I. That provision states in pertinent part as follows:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall be ever made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*. [Emphasis added].

This language, including the critical phrase "being responsible for the abuse of that liberty," owes its origin to the Constitution of 1790. It has remained unchanged ever since. "While thus securing liberty to the press, the constitution has also steadily aimed at guarding against its abuse." *Commonwealth v. Swallow*, 8 Pa. Super. 539, 603 (1898).

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6. The Declarations and Resolves of the First Continental Congress, October 14, 1774, also made reference only to "life, liberty, and property," *Documents* at 83, the most familiar "triad" associated with the influential writings of John Locke. *See G. Wills, Inventing America: Jefferson's Declaration of Independence at* 229 (1978).

Finally, section 11 of Article I of the Pennsylvania Constitution is also of great significance. It completes the comprehensive scheme so well thought out by the framers. That section states:

> All courts shall be open: and every man for an injury done him in his lands, goods, person, or *reputation* shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth, in such manner, in such court and in such cases as the Legislature may by law direct. [Emphasis added.]

This provision has remained virtually unchanged from its original form in 1790 when it appeared as Article IX, Section 11.

In Article I, Sections 1, 7, and 11, the framers of the Pennsylvania Constitution established with as much permanence as was legally possible a set of "unalterable," "inherent," and "indefeasible" constitutional rights. The framers placed these absolute rights beyond the reach of any simple legislative act. Older and no less venerable than the federal Bill of Rights itself, these state constitutional provisions have at the very least raised the interest in reputation to the status of a right protected by the fourteenth amendment. Although the Pennsylvania Superior Court has in *Hatchard v. Westinghouse Broadcasting Co. KYW-TV 3*, No. 02219 Phila. 1982, Slip Op. (Pa. Super., Jan. 24, 1986) (a non-public plaintiff case), rejected the argument that the Pennsylvania Shield Law is rendered unconstitutional by the above quoted provisions, in the circumstances shown in this case the application of the Shield Law nonetheless offends the fourteenth amendment by conclusively stripping from the public plaintiff his vested right to protect his reputation.

To Officer Coughlin, the District Court's use of the Pennsylvania Shield Law to preclude not only the discovery of confidential sources but *also* any inquiry into editorial processes, struck what can only be described as a mortal blow to his libel action. Although, as the District Court stated, Officer Coughlin's explanation for the conduct depicted on the Westinghouse tape is not "seriously challenged" by the defendant (A-38) the Shield

Law has thus been instrumental in perpetuating the unjust stain upon Officer Coughlin's reputation. Indulgent in its legal posture, Westinghouse has never even bothered to retract the false and unsupportable accusations.

The fourteenth amendment's due process clause is directly violated by the fatal burden placed upon the libel plaintiff through the application of the Shield Law. Because the Pennyslvania Constitution gives explicit recognition of the right to vindicate by a court action one's guaranteed right of reputation, Officer Coughlin accrued a specific property and liberty interest in that action. *See Paul v. Davis*, 424 U.S. 693, 710-711 (1976).

In light of the state-constitutional guarantee of a right to pursue a lawsuit in the protection of one's reputation, the interjection of a state privilege statute which in reality extinguishes that right without any recourse is a direct impingement of a vested liberty and property interest. The state is not free to close the courtroom doors upon attempts to effectuate a vested state law guarantee.

The strength of the Petitioner's argument is clearly evident from the contrast with the limited nature of the decision in *Paul v. Davis*. In *Paul* the Court explained that fourteenth amendment due process protections did not apply to a state's violation of ah interest in reputation because the applicable

> Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's actions. Rather, his interest in reputation is simply one of a number which the state may protect against injury by virtue of its tort laws. . . .

424 U.S. 711-712. In the present case, the Pennsylvania Constitution itself expressly confers the very guarantee which was lacking in *Paul*. In this setting, the application of a state statute which in reality destroys the benefit of the express guarantee of a right to protect one's reputation in court is an invasion of interests which are indeed protected by the fourteenth amendment. The application of the Pennsylvania Shield Law in the

circumstances of this public official case, is, therefore, genuinely worthy of this Court's review.

CONCLUSION

The Third Circuit Court of Appeals, in affirming the District Court's summary judgment for Respondent Westinghouse, has given the *Times* actual malice standard a force which was never intended. Although other Circuit and state courts have respected circumstantial evidence of actual malice, the Third Circuit rejected all of the plaintiff's substantial evidence, reaching far beyond the judicial function envisioned by *Times* and creating serious confusion about the meaning of "actual malice."

The "nearly impossible" threshold created by this use of the *Times* rule was further unfairly compounded in this case by the use of the Pennsylvania Shield Law to prevent the discovery of *any* information not publicly broadcast by the media defendant. The public official plaintiff thus suffered the total destruction of any libel remedy. This use of the Shield Law in the face of the *Times* burden deprived the plaintiff of his right to reputation, a right specifically guaranteed by the Pennsylvania Constitution. Because the plaintiff's right to reputation is a vested one, the total, summary deprivation of that right is in direct violation of the due process clause of the fourteenth amendment.

WHEREFORE, the Petitioner respectfully requests that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

James E. Beasley, Esquire
William P. Murphy, Esquire
Sarah M. Thompson, Esquire
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1145

COUGHLIN, JAMES and COUGHLIN, PATRICIA h/w,
Appellants

vs.

WESTINGHOUSE BROADCASTING AND CABLE INC.

(D.C. Civ. No. 83-0944)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GARTH, BECKER and VAN DUSEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 21, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 28, 1985, be, and the same is hereby affirmed. Each party to bear its own costs.

ATTEST:

Clerk

December 30, 1985

COUGHLIN, James and Coughlin, Patricia, his wife, Appellants,
v.
WESTINGHOUSE BROADCASTING AND CABLE INC., Appellee.
No. 85-1145

United States Court of Appeals,
Third Circuit.
Argued Oct. 21, 1985.
Decided Dec. 30, 1985.
As Amended Jan. 6 and Jan. 14, 1986.

James E. Beasley, Sarah M. Thompson, William P. Murphy (Argued), Beasley, Hewson, Casey, Colleran, Erbstein & Thistle, Philadelphia, Pa. for appellants.

Jerome J. Shestack (Argued), Carl A. Solano, Robert F. Harchut, Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., Stephen A. Hildebrandt, Westinghouse Broadcasting and Cable, Inc., Washington, D.C., for appellee.

Before GARTH and BECKER, Circuit Judges and VAN DUSEN, Senior Circuit Judge.

OPINION OF THE COURT

PER CURIAM.

Plaintiffs James and Patricia Coughlin filed suit against defendant Westinghouse Broadcasting and Cable, Inc. ("Westinghouse") alleging that Officer Coughlin, a Philadelphia police officer, was defamed by a series of television programs broadcast in February 1982 by KYW-TV, a Philadelphia television station owned and operated by Westinghouse.[1] According to Coughlin, those broadcasts impliedly accused him of accepting a bribe when it broadcast a clandestine videotape of Coughlin exiting a so-called after hours club with what appeared to be an

1. Plaintiff also asserted claims for false light (casting individual in false light), invasion of privacy, and intentional infliction of emotional distress. Mrs. Coughlin alleged loss of consortium. The district court granted summary judgment as to all these additional claims, and the parties have not addressed them separately on appeal.

envelope while on patrol duty. Coughlin also challenged the constitutionality under the state and federal constitutions of the Pennsylvania Shield Law, 42 PA.CONS.STAT.ANN. §5942(a) (Purdon 1982), which was applied by the district court to preclude plaintiff's discovery of outtakes and source materials used in preparation of the allegedly defamatory broadcasts.

On February 28, 1985, the district court, finding that Coughlin, a public official, had failed to adduce sufficient evidence raising a genuine issue of material fact as to the question of actual malice, granted summary judgment in favor of Westinghouse. The court also denied Coughlin's motion to compel discovery of KYW's news sources and editorial processes involved in making the documentary pursuant to the Pennsylvania Shield Law.

I.

This action arises out of a television broadcast of "After Hours on American Street," a February 17, 1982 news report prepared by the KYW-TV investigative news unit, the I-Team.[2] The broadcast stemmed from complaints registered by local residents in late 1980 that the Ukranian-American Club, located at 610 American Street in Philadelphia, was a so-called "after hours" club illegally selling liquor to the general public past the 3:00 A.M. closing time mandated by Pennsylvania state liquor law. The investigation conducted by the I-Team was directed to discovering whether citizen complaints that the responsible government authorities—the Philadelphia Police Department and the Pennsylvania Liquor Control Board—were not properly enforcing the liquor laws at the club.

From a concealed vantage point, the KYW I-Team filmed activities surrounding the Club on the nights of October 10, 11 and 17, 1981. Plaintiff Coughlin, at the time a rookie patrol officer, was assigned to the midnight to 8:00 A.M. patrol shift for the sector containing the Ukranian American Club. On the night

2. For a more detailed recitation of the relevant facts of this case, see the district court opinion, *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F.Supp. 377, 379-380 (E.D.Pa. 1985).

of October 11, 1981, Coughlin was directed by police radio to conduct a "club check" at the Ukranian Club at approximately 4:05 A.M. At the club, Coughlin was informed that another officer had in fact just been there, and Coughlin then proceeded to leave the club carrying what he claimed was his book of incident report forms in his right hand.

At 7:15 A.M. on the morning of February 10, 1982, while returning home from working the midnight patrol shift, Coughlin was approached by a reporter and cameraman from KYW-TV attempting to question him regarding the events on the night of October 11, 1981. Coughlin requested that no filming take place, asked that the reporter identify himself, and, calling KYW's behaviour "harassment," refused to answer any questions. KYW did not seek another interview with Coughlin. Coughlin, however, was told by his superiors at police headquarters that he was free to talk to the I-Team about this incident if he chose to do so.

When the videotape of Officer Coughlin's October 1981 activities was broadcast by KYW on February 17, 1982, and in follow-up reports on February 18 and 19, 1982, KYW stated that Coughlin was carrying an envelope when he exited the club on October 11, 1981. This interpretation of the incident as revealed on the videotape, combined with other statements in the broadcast concerning possible police corruption surrounding the enforcement of liquor laws at after hours clubs, combined to support Coughlin's charge that the broadcast accused him of taking a bribe.

An internal police investigation of Coughlin's activities failed to result in any charges being filed against him. Police officials testified that they believed Coughlin was carrying a "48" [incident report] book when he left the Club. Subsequent laboratory analysis of the film conducted by the police department and the FBI failed to conclusively establish what Officer Coughlin in fact had in his hand that night.

Applying the rule of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), to this public official libel action, the district court held that Coughlin had the status of a public official; that the broadcast was capable of a defamatory

meaning; and that Coughlin had raised a genuine issue of material fact concerning the truth or falsity of those allegedly defamatory statements. *Coughlin*, 603 F.Supp. at 385. As to the issue of actual malice, the district court determined that Coughlin had failed to raise a genuine issue of material fact that KYW broadcast those statements "with knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not." *Id.*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. The court rejected Coughlin's contentions that Westinghouse's alleged hostility towards the Philadelphia police department, reliance on biased sources and failure to investigate constituted sufficient evidence of malice to withstand the defendant's motion for summary judgment. *Coughlin*, 603 F.Supp. at 386.

II.

We likewise reject Coughlin's contentions. We do so substantially for the reasons so well expressed in Chief Judge Luongo's thoughtful district court opinion. *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F.Supp. 377 (E.D. Pa. 1985). Accordingly, we hold that the district court correctly determined that Coughlin was a public official, and correctly concluded as well that Coughlin failed to raise a genuine issue of material fact as to the issue of actual malice.

With respect to the constitutional issue raised by Coughlin as to the Pennsylvania Shield Law, 42 PA.CONS.STAT.ANN. §5942(a) (Purdon 1982).[3] we recognize this issue was not presented as forcefully as the issue of actual malice under *New York*

3. 3. The Pennsylvania Shield Law, 42 PA.CONS.STAT.ANN. §5942(a) (Purdon 1982) provides:

§5942. Confidential communications to news reporters

(a) General rule.—No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

Times. However, pursuant to our request at oral argument, the parties submitted more extensive briefs directed to the question of the constitutionality of invoking the Pennsylvania Shield Law to preclude discovery of a reporter's notes and sources by a plaintiff in a public official libel action. Upon review of their submissions, we are satisfied that the Pennsylvania Shield Law, as applied to public official libel actions, suffers from no state or federal constitutional infirmity. Specifically, we hold that the Shield law does not abridge any rights guaranteed by Article I, Sections 1, 7 or 11 of the Constitution of the Commonwealth of Pennsylvania. Nor does it result in a denial of due process in violation of the fourteenth amendment to the United States Constitution.[4]

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4. Article I, Section 1 of the Pennsylvania Constitution provides:

Section 1. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Article 1, Section 7 provides:

Sec. 7. Freedom of press and speech; libels

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Article 1, Section 11 provides

Sec. 11. Court to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Accordingly, we affirm the district court's order of February 28, 1985 which granted Westinghouse's motion for summary judgment.

Each party will bear its own costs.

BECKER, Circuit Judge, concurring:

Although I believe that Officer Coughlin has been defamed, I cannot fault the majority's conclusion that plaintiffs have not adduced evidence of malice or reckless disregard sufficient to meet the rigorous *New York Times* standard. Hence, I agree with the majority's conclusion that the district court did not err in granting summary judgment on the merits. What for me are the close and difficult questions in this case are whether the Pennsylvania Shield Law violates the Pennsylvania Constitution or the federal Constitution. These questions are essential to the outcome of the case because the Shield Law operates to choke off sources from which Coughlin might have proved actual malice or reckless disregard.

The majority states that the Shield Law survives both constitutional challenges. I agree. The majority does not state its reasoning on the crucial constitutional questions, however, so I cannot be sure of the foundation of our agreement. I believe that these questions are of sufficient complexity and importance that they deserve full analysis. The Pennsylvania constitutional questions have rarely been considered in the case law, never in depth. The federal constitutional question, although the subject of more litigation, presents difficult and complex issues that should not be dealt with summarily. I therefore write separately to explore the relevant history and to articulate the arguments and reasoning involved in these difficult questions.[1]

I. *THE PENNSYLVANIA SHIELD LAW*

The Pennsylvania Shield Law, 42 Pa.Cons.Stat.Ann. §5942(a) (Purdon 1982) provides, in relevant part:

1. I wish to acknowledge at the outset the excellent and comprehensive briefs filed by both parties. They made the difficult analyses much easier.

> *General Rule*. No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any governing unit.

The Pennsylvania courts have repeatedly emphasized the important interests served by the Shield Law, and have held that it is to be broadly construed. In *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963), for example, the Supreme Court of Pennsylvania stated that the Shield Law was to be "liberally construed in favor of the newspapers and news media," *id*. at 40, 193 A.2d at 185, and it emphasized that the Shield Law served a vital public function:

> [I]mportant information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy, and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against government inefficiency, corruption and crime be preserved against piercing and erosion.

Id. The Court held that the Shield Law protected any documents that might provide evidence of a reporter's news sources. *Id*. 193 A.2d at 184-85. *See also Hepps v. Philadelphia Newspapers, Inc*., 506 Pa. 304, 327-28, 485 A.2d 374, 387 (1984) (reaffirming *Taylor* and emphasizing the breadth of the Shield Law), *prob. jur. noted*, ____U.S. ____105 S.Ct. 3496, 87, L.Ed.2d 628 (1985). This court has held that the Shield Law even protects "outtakes," *i.e*., filmed or recorded material not included in the broadcast, because the outtakes might reveal news sources. *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 277-78 (3d Cir. 1980).

II. *THE PLAINTIFFS' DISCOVERY REQUESTS*

Plaintiffs moved for discovery of (1) defendant's outtakes; (2) facts supporting statements made in the broadcast and the sources of those facts; (3) records or evidence of the defendant's efforts to verify its information; (4) the defendant's editorial processes as to each statement; and (5) the names of the defendant's allegedly confidential sources. *Coughlin v. Westinghouse Broadcasting and Cable*, 603 F.Supp. 377, 380 (E.D. Pa. 1985). The district court ruled that each of these requests was barred by the Shield Law, *id.* at 380 n. 2, and that the Shield Law violated neither the state nor the federal constitutions, *id.* at 381-83. The court relied on *Samuelson v. Susen*, 576 F.2d 546 (3d Cir. 1978), although that case was concerned solely with Ohio law, and on *Rosen v. N.L.R.B.*, 735 F.2d 564 (D.C. Cir. 1984), which dealt with a federal due process challenge to the application of the attorney-client privilege in a particular case. 603 F.Supp. at 382. The court also explained that it was reluctant to "second guess the state's policy decisions," *id.* at 383, embodied in the Shield Law.

The plaintiffs do not dispute that the Shield Law applies to all of the information sought. Therefore, although I have some doubts that the Shield Law does extend so far,[2] I will assume this to be true. The plaintiffs appeal the district court's rulings about the state and federal constitutionality of the Shield Law, arguing that the Shield Law violates art. 1 § 1 and art. 1 § 7, of the Pennsylvania Constitution,[3] as well as the due process clause of

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2. The Shield Law protects only sources of information, not the thought or editorial processes of reporters or news organizations. Neither plaintiffs' third nor fourth requests—evidence of defendants' efforts to verify its information and the editorial process of each statement—would necessarily disclose any information about the defendant's sources. The distinction between source information and information about editorial processes is well-recognized. *See, e.g.*, Note, *Source Protection in Libel Suits after Herbert v. Lando*, 81 Colum.L.Rev. 338, 359 (1981).

3. Plaintiffs raise one other state constitutional issue, whether the Shield Law violates art. I, § 11 which states, in relevant part, that "(a)ll courts shall be open; and every man for an injury done him in his . . . reputation shall have

the fourteenth amendment. I consider each of these contentions in turn.

III. *ARTICLE I, SECTION 1*

Pennsylvania Constitution art. I, §1 owes its origin to the Constitution of 1790, where it appeared as Article IX, section 1. *The Proceedings Relative to Calling the Conventions of 1776 and 1790* at 161 (John S. Wrestling, Harrisburg, 1825) (referred to hereinafter as "*Proceedings*"). It states:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty of acquiring, possessing and protecting property *and reputation*, and of pursuing their own happiness.

(emphasis supplied). Except for being shifted to a more prominent place within the Constitution, the provision has remained unchanged since 1790.

The inclusion of reputation among the short list of "inherent and indefeasible" rights marked a departure from the

NOTES *(Continued)*

remedy by due course of law." Plaintiffs argue that this section guarantees them a cause of action for damage to reputation and that the Shield Law effectively abridges that right of action.

Leaving aside whether it may accurately be said that the Shield Law actually abridges a cause of action, or merely makes it more difficult to prosecute such an action, *see infra* pp. 21, 28 & n. 16, I believe that this argument rests upon a misreading of art. I, §11. That section was aimed at corrupt judges and court officers who extorted money for hearing cases, *see* C.R. Buckalew, An Examination of the Constitution of Pennsylvania 17-18 (1883); T.R. White, Commentaries on the Constitution of Pennsylvania 159-60 (1907), and was intended only to guarantee equal access for all litigants. It was not meant to enshrine any causes of action in the state constitution. *Cf. McCollum v. Birmingham Post Co.*, 259 Ala. 88, 65 So.2d 689 (1953) (interpreting a substantially similar clause of the Alabama Constitution in the same way). The Pennsylvania Supreme Court has at least twice expressly rejected the argument that art. 1 §11 limits the power of the legislature to create, abolish, or limit causes of action, *Freezer Storage, Inc., v. Armstrong Cork, Inc.*, 476 Pa. 270, 281, 382 A.2d 715, 721 (1978); *Singer v. Sheppard*, 464 Pa. 387, 399, 346 A.2d 897, 903 (1975).

then-prevailing constitution of 1776 which had referred to the rights of "enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Ch. I §1. *See Proceedings* at 55. Indeed, most similar documents of the day did not elevate reputation to the pantheon of inalienable rights. *See, e.g.*, Virginia Bill of Rights, of June 12, 1776 (*reprinted in* H.S. Commager, *Documents of American History* 103 (9th ed. 1973)); Declaration of Independence (*reprinted in* Commager at 100 (referring to "Life, Liberty, and the pursuit of Happiness"); The Declarations and Resolves of the First Continental Congress, October 14, 1774 (*reprinted in* Commager at 83) (referring to "life, liberty, and property"). The Pennsylvania Constitution was one of the few that expanded the list. *Cf.* Article XI Massachusetts Bill of Rights of 1780 (*reprinted in* Commager at 107) (guaranteeing remedies for wrongs to "person, property, or character"). Pennsylvania's departure seems to have been prompted in part by the controversial case of *Respublica v. Oswald*, 1 Dall. 319, 1 L.Ed. 155 (Pa. 1788), which involved alleged libel by the press.[4] In addition, the proper balance between a free press and the protection of reputation was the subject of debate and litigation throughout the young nation. We can be confident that the inclusion of reputation in the Constitution was thoroughly discussed.

Given this background, we may assume that the inclusion of reputation in the Constitution was not merely rhetorical or lightly considered. It reflected a considered choice that we must respect. *Cf. Commonwealth v. Swallow*, 8 Pa.Super. 539, 603 (1898) ("Among the rights declared by the constitutions of 1790,

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4. Oswald, a newspaper publisher, was arrested for libel. After his release on bail, he published an article accusing several members of the state Supreme Court of bias. He was cited for contempt of court. The Supreme Court upheld the contempt charge, rejecting Oswald's argument that freedom of the press guaranteed him immunity. Both Chief Justice McKean, who sat on the case, and William Lewis, who prosecuted Oswald's contempt citation, were delegates to the Convention of 1790. R.L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* 225 (1942).

1838, and 1873 to be 'inherent and indefensible' is that of protecting reputation"). Reputation was put on the same constitutional footing as life, liberty and property, *Meas v. Johnson*, 185 Pa. 12, 19, 39 A. 562, 563 (1898), and it is therefore undeniable that the Pennsylvania Constitution creates a right in reputation which the judiciary is bound to protect.[5]

Plaintiffs argue that the Shield Law makes it so difficult to prosecute a defamation or libel action that their right of reputation is effectively denied. The argument has force: libel suits and defamation suits are the only ways private individuals can protect their reputation rights against infringement by a powerful media, and the Shield Law in conjunction with the "actual malice" standard imposed by *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed. 2d 686 (1964) makes successful prosecution of libel and defamation suits exceedingly difficult for public figures.[6] Nevertheless, for the reasons stated below, I feel that the argument must ultimately fail.

Pennsylvania courts have held that the right to reputation, although undeniably enshrined in the Constitution, is not inviolable. Like other property rights with constitutional "guarantees," the right to reputation may suffer on account of a public policy or need for some other good. *See, e.g., Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952); *Commonwealth v.*

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5. I thus reject defendant's attempt to diminish the significance of the right to reputation, Neither the fact that Blackstone may have considered reputation less significant than other rights, *see* 1 W. Blackstone, Commentaries *122, nor the fact that constitutional conventions after 1790 debated the need to balance the right to reputation against the right of free expression, *see e.g.*, 5 Debates of the Convention to Amend the Constitution of Pennsylvania 589 (1973); 12 Proceedings and Debates of the Pennsylvania Convention, 1837-38 4-9 (1838), diminishes the importance of the right to reputation. Our interpretation of the Constitution should not be controlled by Blackstone. Subsequent debates are informative, but the fact that defendant points to no changes in art. 1, §1 on account of the debates leaves me unconvinced that the debates diminsh the force of that section.

6. A long line of cases demonstrates that police officers are public figures, *see, e.g., Time Inc. v. Pape*, 401 U.S. 279, 284, 91 S.Ct. 633, 636, 28 L. Ed. 2d 45 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 739, 88 S. Ct. 1323, 1327, 20 L. Ed. 2d 262 (1968); *Henry v. Collins*, 380 U.S. 356, 357, 85 S. Ct. 992, 993, 13 L. Ed. 2d 892 (1965), and that point is not disputed here.

Murphy, 8 C.C. 399, 405 (1890) ("Just as private property may be taken by the state for the public benefit, so a man's character and reputation may be made to suffer for the public good.") When confronted with a choice between the right to reputation on the one hand, and public policy as expressed by an enactment of the state legislature on the other, a court is forced to balance the two considerations. Because this is purely a matter of state law, we must balance as we believe the state supreme court would.

We are faced with the initial problem that the Pennsylvania courts have not articulated a clear standard for the balance. Does legislation that infringes upon the right to reputation have to be the "least restrictive" alternative, that is, must it infringe on the right to reputation only as much as necessary to accomplish its goals? Or, does the legislation have to be only "reasonably related" to its goals to pass state constitutional muster?[7] We simply do not know.

Despite this problem, I think that we can reach an answer (and need not abstain, *see Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)), because there have been several cases which, although not directly on point, are sufficiently similar as to be strongly suggestive that the Pennsylvania courts would uphold the Shield Law against this constitutional challenge. First among these cases is *Matson v. Margiotti, supra*, in which the Pennsylvania Supreme Court upheld the absolute immunity of the State Attorney General as a defense against a charge of libel. The Court reasoned that the plaintiff's interest in reputation notwithstanding, the goals served by the common law right of absolute immunity outweighed competing considerations.[8] Matson demonstrates that

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7. These are, of course, the tests often used in the federal due process and equal protection areas, but there is no reason that the Pennsylvania courts must be limited to these and cannot develop other standards for the interpretation of their own statute.

8. The Court said:

[N]either freedom of speech nor freedom to protect one's property and

the right to reputation may be overridden by a claim of privilege if the public interest so requires.

More recent cases such as *In re Taylor*, 412 Pa. at 32, 193 A.2d at 181, and *Hepps, supra*, 506 Pa. at 304, 485 A.2d at 374, although not explicitly concerned with the right of reputation, insist upon the value of the Shield Law to the functioning of the government. *Taylor* emphasized the institutional role of the press in a democratic government. *Hepps*, although less explicit than *Taylor* on this point, reaffirmed the breadth of the Shield Law's coverage. Since *Taylor* had extended the Shield Law's breadth on account of its crucial institutional role, it is reasonable to read into *Hepps'* holding a similar statement about the importance of the Shield Law for press and society.

Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981), although not involving the Shield Law, provides further support for this position. The issue in *Tate* was whether people distributing leaflets on a college campus could be convicted of criminal trespass. The court framed the issue as a clash between the defendant's right to freedom of expression and the college's right to control activities on its own property. Balancing the two rights, the court held that the right to expression must prevail on account of the "invaluable" nature of free speech. *Id.* at 175, 432 A.2d at 1391. Admittedly, the factual circumstances of *Tate* are very different from those of this case, but the essential issue in the two cases is the reconciliation of the freedom of expression of

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NOTES *(Continued)*

reputation—each of which is guaranteed by the [Pennsylvania] Constitution—is unlimited, and it is obvious that they must sometimes be competing and conflicting . . . Even though the innocent may somethings suffer irreparable damage, it has been found to be in the public interest and therefore sounder and wiser public policy to "immunize" public officials [from liability for defamation].

371 Pa. at 202-03, 88 A.2d at 899. It is worthy of note that the official immunity at issue in *Matson* was part of the common law, and thus lacked the statutory authority of the reporters' privilege at issue here. It is also significant that whereas *Matson* suggested that libel suits against certain officers of the state might be completely barred, the Shield Law does not create a bar to suits, but merely restricts the evidence that may be used in such suits.

some and the property rights of others. The *Tate* decision demonstrates again the extremely high value the Pennsylvania Supreme Court places on free speech.

While the question is close, these cases suggest that the Pennsylvania Supreme Court has historically placed such importance on free speech in general, and on the Shield Law in particular, that it would uphold its constitutionality today against the art. 1, §1 challenge despite the consequent cost to the right of reputation. Perhaps the Pennsylvania courts, which are the authoritative interpreters of the Pennsylvania Constitution, will view the matter differently. Perhaps they will impose a "least restrictive alternative" analysis, or strike a somewhat different balance that will give libel plaintiffs a better chance of success.[9] As a federal judge I am more constrained, and seeing no clear way to narrow the Shield Law without emasculating it, *see* discussion *infra* at 349, I would leave any such exercise to the state courts if they are so disposed.

IV. *ARTICLE I, SECTION 7*

Plaintiffs' second argument relies on Pa. Const. art. I §7:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, print on any subject, *being responsible for the abuse of that liberty*. . . .

(emphasis supplied). The restraint on the press imposed by the requirement that the press be responsible for abuses of its liberty entered the Constitution in 1790, a product of the same conservative forces mentioned in the discussion of art. I §1. *See supra*

9. I note, however, that any finely tuned balancing may have to await the United States Supreme Court's decision in *Hepps*, 506 Pa. 304, 485 A.2d 374 (1984), *prob. jur. noted*, ___ U.S. ___, 105 S.Ct. 3496, 87 L.Ed. 2d 628 (1985), and *Liberty Lobby Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2672, 86 L.Ed. 2d 691 (1985). *See infra* n. 17.

Part III. The Constitution of 1776, by contrast, had no such restraints, focusing exclusively on the value of an unfettered press. Chapter I, section 12 of the Constitution of 1776, for example, said:

> [T]he people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained.

Quoted at *Proceedings* at 56. Elsewhere the Constitution of 1776 stated:

> The printing presses shall be free to every person, who undertakes to examine the proceedings of the legislature, or any part of government.

Chapter II, section 35, quoted in *Proceedings* at 63. The earlier Constitution was thus clearly more concerned with preventing limitations on the press than with curbing potential abuses by the press. The Constitution of 1790, by contrast, evidences a significant concern with press abuses. The Superior Court of Pennsylvania has recently described the shift from the 1776 Constitution to the 1790 Constitution:

> The apparent absoluteness of the 1776 guarantee of freedom of expression and its capability for abuse gave rise to an exemption from its protection, for it soon became clear, that although the freedom of *expression* is arguably an absolute right, the right to *protection from prosecution for abuse of freedom* is a limited one.

Long v. 130 Market Street Gift and Novelty of Johnstown, 294 Pa.Super. 383, 398, 440 A.2d 517, 525 (1982).[10]

Plaintiffs' argument, simply stated, is that the Shield Law makes it virtually impossible for plaintiffs to succeed in a libel suit against the television station; that libel suits are the principle guarantors that the press be responsible for its abuse of liberty;

10. The Pennsylvania Supreme Court took an especially long historical view of art. I, §7 in *Goldman Theaters v. Dana*, 405 Pa. 83, 88, 173 A.2d 59, 62, *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1962), tracing its roots back to Blackstone.

and, thus, that the Shield Law effectively absolves the defendant of all responsibility for the abuse of its liberty, in violation of art. I §7. I cannot accept this argument for two reasons. First, it requires an unjustifiably broad reading of art. I, §7. On its face, that section would require only that the press not be absolutely immune from libel and defamation actions. Clearly, the Shield Law would not violate this reading of art. I, §7. Plaintiffs, however, would have us read that section as guaranteeing not only that the press is not immune but also that plaintiffs have certain rights of access to press documents in libel and defamation actions. Plaintiffs can point to no elements of the legislative history of the provision that would justify this reading, however, and it is doubtful that the authors of 1790 had in mind such a right of access.

I am encouraged in this reading by the very similar case of *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376 (1982). In that case, the New Jersey Supreme Court considered a plaintiff's claim that the New Jersey Shield Law, N.J.Stat.Ann. §2A:84A-21 (West Supp. 1985), violated a state constitutional provision that "[e]very person may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right*." N.J. Const. art. 1, ¶ 6 (emphasis supplied). The Court rejected the plaintiff's argument, drawing the same distinction that we draw here; the Court interpreted the constitutional provision as merely precluding absolute immunity from libel actions, not requiring that all libel actions be unrestricted:

> The entire thrust of Art. 1, ¶ 6 is protection of speech. The framers, however, did not want that protection to be absolute. Specifically, they did not view the existence of a libel action as inimical to free speech. They therefore inserted a clause to insure that the broad speech protection they were providing would not be construed to preclude libel suits.
>
> This is all that the clause means. We do not believe that it was intended to create a right to sue for damages in libel. Had the framers intended such a right, they surely would have expressed that intent more directly.

Id. at 192, 445 A.2d at 385. *But see id.* at 202-03, 445 A.2d at 392-93 (Schreiber, J., dissenting) (arguing that New Jersey's Shield Law did violate that portion of the state's constitution). This reasoning is equally applicable to the Pennsylvania Constitution, art. I, §7.

The second reason we reject plaintiffs' argument under art. I, §7, is although the Shield Law affects the *manner* in which plaintiffs may develop evidence to support his defamation claim, it does not make successful defamation claims impossible. Plaintiff may use other evidence, both direct and circumstantial, to substantiate his claim. Admittedly, the plaintiffs' case is made much more difficult by the Shield Law, but that reflects a choice by the state legislature that it is not within our power to upset.

V. *PLAINTIFFS' DUE PROCESS CLAIM*

Plaintiffs argue that the Shield Law in conjunction with the heavy burden of proof imposed upon them by *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) makes it virtually impossible for them to protect their reputations by pursuing their libel claim. Because they have a property interest in reputation, *see* Pa. Const. art. I, §1, *supra* Part III, plaintiffs claim that they are denied due process.[11]

It is hard not to sympathize with plaintiffs. The *New York Times* standard makes it hard enough for a public figure to win a liable suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media.

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11. It is important to note that my conclusion that the Shield Law does not violate the Pennsylvania Constitution does not preclude the possibility that the Shield Law violates the due process clause. The questions asked and issues raised in the two inquiries may be similar, *see supra* n. 7; however, the standards that we use to evaluate the two questions may be different. The state courts might mandate a less demanding test or the state courts might focus on different factors than do the federal courts in due process cases. Either way, the state constitutional analysis concluding that the Shield Law passes state constitutional muster would not preclude a federal due process analysis.

The Shield Law makes it more difficult still.[12] Nevertheless, I am constrained by the decisions of the Supreme Court in this area, and persuaded by the reasoning of sister courts in similar cases, to find that the plaintiffs' argument must fail. Because neither the district court nor the majority of this panel discussed this issue in detail, I find it necessary to explore the background of reporters' privileges and shield laws.

A. *Reporters' Common Law Privileges*

My analysis begins with the seminal case of *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) in which three reporters, subpoenaed to appear before grand juries to divulge the names of certain of their informants, challenged the subpoenas on first amendment grounds. The reporters argued that they had promised confidentiality to their sources, and that they had a first amendment right to protect the confidentiality of their sources. By a vote of 5-4, with a plurality opinion by Justice White and a concurring opinion by Justice Powell, the court held that although the journalists' cultivation of confidential news sources was a part of news-gathering that deserved first amendment protection.[13] society's "fundamental" interest in law

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12. Other courts and scholars have noted the difficult position of public figures confronted with claims of reporters' privilege. *See, e.g., Carey v. Hume*, 492 F.2d 631, 634 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938, 94 S.Ct. 2654, 41 L.Ed.2d 661 (1974); *id.* at 640 (MacKinnon, J., concurring); *DeRoburt v. Gannett Co., Inc.*, 507 F.Supp. 880, 884 (D. Hawaii 1980). *See also* Sack, *Special Discovery Problems in Media Cases* 6 Litigation 21, 22-23 (1980).

13. All of the justices acknowledged that the confidentiality of sources did have a basis in the first amendment. *See* 408 U.S. at 681, 92 S.Ct. at 2656 (opinion of White J., joined by Blackmun, Rehnquist, JJ., and Burger, C.J.) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); *id* at 709, 92 S.Ct. at 2670 (Powell, J., concurring) ("The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."); *id.* at 712, 92 S.Ct. at 2671 (Douglas, J., dissenting) ("[T]he First Amendment protects [a reporter] against an appearance before a grand jury."); *id.* at 725, 92 S.Ct. at 2671 (Stewart, J., dissenting,

enforcement overrode the first amendment interests at stake.

In the wake of *Branzburg*, courts faced with assertions of reporters' privileges have proceeded on a case-by-case basis,[14] balancing the reporters' rights against the interests of those seeking information. *United States v. Criden*, 633 F.2d 346 (3d Cir, 1980), *cert. denied*, 449 U.S. 113, 101 S.Ct. 924, 66 L.Ed.2d 842 (1981); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir.) *cert. denied* sub nom. *Cuthbertson v. C.B.S Inc.*, 449 U.S. 1126, 101 S.Ct. 945, 67 L.Ed.2d 113 (1981); *Miller v. Transamerica Press, Inc.*, 621 F.2d 721, 726, *on rehearing* 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981); *Palandjian v. Pahlavi*, 103 F.R.D. 410 (D.D.C. 1984); *Continental Cablevision v. Storer Broadcasting*, 583 F.Supp. 427 (E.D. Mo. 1984). As a result of their case-by-case analyses, the courts eventually fashioned a three-step test, first articulated in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958), for resolving the privilege cases: the reporter's privilege is overridden only if (a) the information sought is relevant, (b) it cannot be obtained by alternative means, and (c) there is a compelling interest in the information. *See, e.g., Criden, supra; Cuthbertson, supra; Miller, supra; Continental Cablevision, supra.*

B. *The Statutory Privilege*

The situation in this case differs from that in the cases just cited, for here we have a shield law, a statutory privilege, whereas those cases involved the constitutional, common law privilege. Although there was no statutory privilege at issue in *Branzburg*, the Court there considered how such a law might have affected its analysis:

NOTES *(Continued)*

joined by Brennan and Marshall, JJ.) ("The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public.").

14. Justice Powell's concurrence in *Branzburg* had suggested that this was precisely the course that the lower courts should take. 408 U.S. at 710, 92 S.Ct. at 2671.

> There is . . . merit in leaving the legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to their relations between law enforcement officials and press in their own areas. *It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.*

408 U.S. at 706, 92 S.Ct. at 2669 (emphasis supplied). Following *Branzburg*, courts insisted that state shield laws deserve great deference and are virtually immune from judicial scrutiny. In *Fischer v. McGowan*, 585 F. Supp. 978, 988 (D.R.I. 1984), for example, the court said:

> [T]his court (whether or not sympathetic to the predicament of the parties) has no choice but to effectuate the balance struck by the Rhode Island General Assembly and to follow exactly the letter of a well-drawn legislative enactment.

(footnote omitted). In *Maressa*, 89 N.J. at 201-02, 445 A.2d at 389-90, the court took a similar position: "[T]he Legislature has weighed the competing interests in a free press and the individual interest in reputation. It has chosen to give greater protection to freedom of speech, and our duty is to enforce that choice." (footnote omitted).

It would appear the the Supreme Court's strong dictum in *Branzburg* and the precedent of *Fischer* and *Maressa* would control this case and make our ruling in favor of the defendants quite obvious. This appears to have been the position of the district court which refused to "second guess the state's policy decisions." *Coughlin*, 603 F. Supp. at 383. Our case is different from *Fischer* and *Maressa*, however, for in those cases the parties seeking to overcome the reporters' privileges did not assert federal constitutional rights; here, by contrast, plaintiff makes a due process argument. Whereas courts may defer to legislatures when parties make policy arguments in favor of overturning reporters' statutory privileges, courts cannot defer to the judgment

of legislatures when the party seeking to overcome the privilege himself asserts a constitutional right. A legislative preference cannot limit a constitutional right.

C. *The Relevance of Mathews v. Eldridge*

Once it is recognized that deference to the state's policy determination embodied in the Shield Law is inappropriate on account of plaintiffs' due process claim, it seems clear that a *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) balancing test is appropriate. Admittedly, this is not the standard setting for the balancing test, but a brief analysis of the situation reveals that it is structurally identical to the more familiar domains of the *Mathews* test: plaintiffs have an undeniable property interest in reputation, *see supra*, Part III, and the question is whether the Shield Law renders their judicial recourse so difficult as to be meaningless and thus a denial of due process. The question, that is, is how much process is due.

Mathews warned that due process " 'is not a technical conception with a fixed content unrelated to time, place and circumstance' " 424 U.S. at 334, 96 S.Ct. at 902 quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)), and gave three factors for a court to consider in determining whether a party had been given sufficient process:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 335, 96 S.Ct. at 903.

Here, the private interest at stake is clear and significant—Officer Coughlin's reputation. Not only is reputation protected by the state constitution, but it has deep, philosophical foundations: the high value we place on reputation "reflects no more than out basic concept of the essential dignity and worth of every human being." *Rosenblatt v. Baer*, 383 U.S. 75, 92, 86 S.Ct. 669, 679, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring). Furthermore, the Shield Law clearly increases the chances that plaintiffs will be erroneously deprived of their property interests: as noted above, the Shield Law makes it significantly more difficult for plaintiffs to prove actual malice than it would be without the Shield Law.

Weighed against these considerable interests are the state's interest in maintaining a free and uninhibited press and the vital role that the Shield Law plays in maintaining that free press. I have already referred to cases in the state courts that have spoken of the crucial structural role played by the press and the Shield Law. The significance of the Shield Law is attested to by the fact that at least 26 states have enacted their own shield laws,[15] many of them similar to Pennsylvania's.

Making exceptions to the Shield Law would impose a considerable burden on the state because of the inevitable uncertainty to which the exception would lead. Parties could not be certain that their conversations and tips would be confidential

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19. 15. *See* Ala.Code §12-21-142 (1975); Alaska Stat. §§09.25.150-.220 (1983 & Supp. 1984); Ariz.Rev.Stat.Ann. §12-2237 (1982); Ark.Stat.Ann. §43-917 (1977); Cal.Evid.Code §1070 (West Supp.1985); Del.Code Ann. tit. 10, §§4320-4326 (1974); Ill.Ann.Stat. ch. 110, §§ 8-901 to -909 (Smith-Hurd 1984); Ind.Code Ann. §34-3-5-1 (Burns 1973 & Supp,1984); Ky. Rev.Stat.Ann. §421.100 (Baldwin 1979); La. Rev.Stat.Ann. §§45:1451-1454 (1982); Md.Cts. & Jud.Proc.Code Ann. §9-112 (1984); Mich. Comp. Laws Ann. §767-51 (West 1982); Minn. Stat. §§595.021-025 (1982) Mont.Code Ann. §§26-1-901 to -903 (1983); Neb.Rev.Stat. §§20-144 to 147 (1977); Nev.Rev.Stat §49-275 (1981); N.J.Stat.Ann. §2A:84A-21 to -21.9 (West Supp. 1984-1985); N.M.Stat.Ann. §38-6-7 (Supp. 1984); N.Y.Civ.Rights Law & 79-h (McKinney 1976 & Supp.1984-1985); N.D. Cent. Code §31-01-06.2 (1976); Ohio Rev. Code Ann. §§2739-04-12 (Page 1981); Okla.Stat. tit. 12, §2506 (1981); Or.Rev.Stat. §§44.510-540 (1983); 42 Pa.Con.Stat.Ann. §5942 (Purdon 1982); R.I.Gen.Laws §§9-19.1-1 to -3 (Supp. 1984); Tenn.Code Ann. §24-1-208 (1980).

and protected, and the stream of information flowing to reporters and then to the public might be severely diminished. No sensitive observer could deny that the balance is a close one about which reasonable people could disagree. Nevertheless, I believe that the balance tilts in favor of the state. The plaintiff is not denied his opportunity to bring his case to court and have it heard; victory, while not easy, is also not impossible.[16] Thus, I believe that the Shield Law survives the *Mathews v. Eldridge* analysis, and I concur with the majority on this point.[17]

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16. As the court in *Samuelson v. Susen*, 576 F.2d 546, 522 (3d Cir. 1978) said about Ohio's shield law: "No doubt the statutory provisions affect the manner in which plaintiff may develop evidence to support his defamation claim. Plaintiff is not, however, foreclosed from prosecuting his claim with other evidence, both direct and circumstantial."

17. Two other federal constitutional issues deserve mention. First, defamation plaintiffs are required to show actual malice with "convincing clarity," *Bose Corp. v. Consumer Corp.*, _____U.S. _____, _____, 104 S.Ct. 1949, 1965 (1984); *Gertz v. Robert Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1984), but there is some question whether the convincing clarity standard applies at the summary judgment stage. That is, to deny a defendant's motion for summary judgment must a district court conclude that a reasonable jury could (i) find existence of actual malice, or (ii) find existence of actual malice *with convincing clarity* (in either case on the basis of the evidence taken in the light most favorable to the plaintiffs)? The district court relied upon *Liberty Lobby Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984), *cert. granted*, _____U.S. _____, 105 S.Ct. 2672, 86 L.Ed.2d 691 (1985); *but see Yiamouyiannis v. Consumers Union*, 619, F.2d 932, 940 (2d Cir. 1980), and ruled that the plaintiff only had to satisfy the first, weaker, requirement to defeat the defendant's motion. It found that the plaintiff had failed to meet even this lesser burden. On account of the lower court's disposition, we need not resolve this issue.

Second, although the majority does not discuss it, I believe that our scope of review is plenary on account of *Bose, supra*. *See Bender v. Williamsport School Dist.*, 741. F.2d 538, 542 n. 3 (1984), *cert. granted* _____U.S. _____, 105 S.Ct. 1167, 84 L.Ed.2d 319 (1985). This court thus differs with *Liberty Lobby, supra*, which held that *Bose* did not apply to court of appeals review of summary judgments.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES COUGHLIN and PATRICIA COUGHLIN	:	CIVIL ACTION
	:	
v.	:	NO. 83-0944
WESTINGHOUSE BROADCASTING AND CABLE, INC.	:	

ORDER

This 28th day of February, 1985, it is ORDERED that:

1. Plaintiffs' Motion to Compel Discovery is DENIED;

2. Defendant's Motion for Summary Judgment is GRANTED; and

3. Judgment is entered in favor of defendant Westinghouse Broadcasting and Cable, Inc.

_____

Ch. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES COUGHLIN and PATRICIA COUGHLIN	:	CIVIL ACTION
	:	
v.		
	:	NO: 83-0944
WESTINGHOUSE BROADCASTING AND CABLE, INC.	:	

OPINION

LUONGO, Ch. J FEBRUARY 28, 1985

Plaintiffs James and Patricia Coughlin, a Philadelphia police officer and his wife, brought this defamation action because of a televised broadcast entitled "After Hours on American Street." The broadcast dealt with alleged official corruption in connection with a Philadelphia after hours club. KYW-TV (channel 3), a Philadelphia television station owned and operated by defendant Westinghouse Broadcasting & Cable, Inc., aired portions of the program on February 17, 18 and 19, 1982.

In 1981, KYW's investigative news team (the I-Team) received complaints concerning the Ukrainian-American Club on American Street in Philadelphia. According to local residents, the club's patrons were noisy and disruptive and the club consistently served liquor after 3:00 a.m., in violation of the Philadelphia Liquor Code. The residents charged that the Philadelphia police and the Liquor Control Board had ignored their complaints. Based on these reports, the I-Team began to investigate the club. The results of their investigation were broadcast in "After Hours on American Street." The program portrayed the activities which led to neighbors' complaints and reported that the investigation raised serious questions concerning whether members of the police department and the Liquor Control Board were doing their jobs. KYW reporter Stan Bohrman described a 1974 Pennsylvania Crime Commission report, which had concluded that Philadelphia's practice of using police

officers to enforce the liquor laws with respect to private clubs fostered corruption. The I-Team, according to the program, had observed police activities on American Street similar to those described by the Crime Commission. The program illustrated this point with films taken outside the club on October 11, 1982, describing the filmed activity as "the most suspicious activity we saw on American Street." The films, accompanied by commentary, first showed police car 39 arriving at the club. An officer entered the club at 3:52 a.m. and left five minutes later. A number of people remained in the club. At 3:57 Officer Coughlin, who was driving car 35, reported over police radio that he was returning to headquarters for paperwork. The officer in car 39 returned to the club at 4:04 land left at 4:11 without recording the stop in his patrol log. Coughlin then drove car 35 to the club, backed up slowly, and drove away. Several minutes later car 35 returned. Coughlin entered the club and came out almost immediately, carrying an object in his hand. At this point, KYW stopped the film and showed Coughlin with a circle drawn around the object in his hand. The accompanying narrative stated: "As far as police radio knows, car 35 is still out at headquarters doing paperwork. Well, the only paperwork we saw him doing was carrying this envelope out of the club less than a minute after he went in. That officer is Patrolman James Coughlin." Elsewhere in the broadcast the narrative stated that an officer who stops without reporting his location over police radio "generally does not want it known that he's there."

KYW then showed film clippings of Coughlin refusing to be interviewed by I-Team reporters about the events described above and another incident on October 11. According to Mr. Bohrman, car 35 had arrived at the Ukrainian-American Club at 12:50 a.m. on October 11 in response to a vandalism complaint. The I-Team noted that when the officer returned from investigating the complaint he tried four times to find the right key to start the car. Because the officer was apparently unfamiliar with car 35, the I-Team conjectured that he was not Officer Coughlin. Coughlin's name was on the official report of the incident, however, and the patrol log recorded him as being in car 35 from

12:00 to 8:00 a.m., October 11. In conclusion, the program reported several other facts for which the I-Team could find no apparent explanation. Coughlin had entered the club at 4:17 a.m. without his standard patrol equipment consisting of nightclub, uniform jacket and hat. Car 35's official patrol log contained an unexplained gap for the period between 4:00 and 4:20 a.m., during which the I-Team had observed Coughlin on American Street. At 3:57, however, Coughlin had reported that he was returning to headquarters for paperwork.

Plaintiff James Coughlin alleges that this program defamed him by implying that he had engaged in corrupt activities and accepted a bribe from the Ukrainian-American Club. He claims the program placed him in a false light, invaded his privacy, and caused him severe emotional distress. Plaintiff Patricia Coughlin seeks damages for loss of her husband's society, companionship and consortium. Plaintiffs seek punitive as well as compensatory damages, alleging that defendant's conduct in airing the broadcast was outrageous.

Currently before me are plaintiffs' motion to compel defendant to answer certain interrogatories and deposition questions and defendant's motion for summary judgment. I will deal with the discovery motion first, and then turn to the summary judgment motion.

I.

Plaintiffs have moved for discovery with respect to the following: (1) portions of defendant's videotapes not included in the broadcast ("outtakes"); (2) facts supporting statements made in the broadcast and sources of those facts; (3) efforts made by defendant to verify its information; (4) defendant's editorial processes as to each statement; and (5) defendant's allegedly confidential sources. Defendant opposes plaintiffs' motion on the ground that the information sought is privileged under the Pennsylvania Shield Law, 42 Pa. C.S.A. §5942(a).[1] Because I con-

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1. Since the allegedly defamatory statements were broadcast in Pennsylvania and the alleged target is a Pennsylvania citizen, I see no reason to reject

clude that Pennsylvania law protects this information from discovery, I will deny plaintiff's motion to compel.[2]

Pennsylvania's shield law provides:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

42 Pa. C.S.A. §5942(a). The Pennsylvania Supreme Court has held that the statute protects not only the identity of confidential sources but also "*documents*, inanimate objects *and all sources of information*." *In re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963) (emphasis original).[3] The court reasoned that the shield law embodies a public policy supporting extensive protection of news sources. In order to effectuate that policy, the court declared, the law must be liberally interpreted in favor of the news media. *Id.* at 40-42, 193 A.2d at 185-86.

The Pennsylvania Supreme Court has recently asserted that the shield law gives media defendants extensive protection from discovery in civil libel cases. *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374, 386-87 (Pa. 1984) (*Hepps II*). *Accord Lal v. CBS, Inc.*, 726 F.2d 97 (3d Cir. 1984); *Steaks Unlimited v. Deaner*, 623 F.2d 264 (3d Cir. 1980); *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (applying Pennsylvania's shield law); *Hepps v. Philadelphia Newspapers,*

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the parties' apparent assumption that Pennsylvania law applies in this diversity action. Under Fed.R.Evid. 501, therefore, questions of privilege must be determined in accordance with Pennsylvania Law.

2. My decision to deny plaintiffs' motion is based on the privilege established by Pennsylvania's shield law. I therefore need not determine whether the information requested is privileged under the First Amendment. *See Lal v. CBS, Inc.*, 726 F.2d 97, 100-01 (3d Cir. 1984).

3. The decision in *Taylor* was based on an earlier verison of the shield law. The current version, however, is "virtually identical" to the former statute. *Lal*, 726 F.2d at 100.

Inc., 3 Pa. D.&C. 3d 693, 707 (C.P. Chester County 1977) (*Hepps I*) (*Taylor* "establishes the privilege against disclosure as absolute"). The Court of Appeals for the Third Circuit, recognizing the breadth of the Pennsylvania shield law, has held that unpublished portions of a filmed interview are privileged even though the identity of the primary source has been revealed. *Steaks Unlimited*, 623 F.2d at 279. The court reasoned that the shield law, as interpreted by *Taylor*, protects secondary as well as primary sources of news. A reporter need not show that unidentified secondary sources actually exist. Under *Taylor*, the statutory privilege applies whenever forced disclosure of an unpublished statement or "outtake" *may* reveal the identity of other sources. *Id.* (citing *Taylor*, 412 Pa. at 43, 193 A.2d at 186). The same reasoning mandates protection of a reporter's notes and resource materials from discovery. *Lal v. CBS, Inc.*, 726 F.2d at 100-01; *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. at 528-29.

Consistently with the liberal, pro-media approach required by *Hepps II* and *Taylor*, information concerning defendant's editorial processes must also be protected from discovery. To permit an inquiry into reporters' thought processes and methods of developing a news presentation would undermine the expansive protection which the shield law provides for newsgathering activities. As the New Jersey Supreme Court stated in holding editorial processes to be protected by a shield law similar to Pennsylvania's: "Discovery of editorial processes is especially threatening to newspersons because it inhibits the exchange of ideas that is crucial to the functioning of a free and vigorous press." *Maressa v. New Jersey Monthly*, 89 N.J. 176, 188, 445 A.2d 376, 383, *cert. denied*, 459 U.S. 907 (1982).

Plaintiffs challenge the validity of the shield law under both the Pennsylvania and United States Constitutions. Plaintiffs cite Pa. Const. art. V, §10(c), which authorizes the Pennsylvania Supreme Court "to prescribe general rules governing practice, procedure and the conduct of all courts." Characterizing the shield law as a rule of evidence and thus as procedural, plaintiffs contend that the legislature unconstitutionally usurped judicial power by enacting the law. Under Pennsylvania law, however,

the legislature may "create or alter rules of evidence." *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 485, 7 A.2d 302, 319 (1939). *See also Phillips v. Unemployment Compensation Board of Review*, 152 Pa. Super. Ct. 75, 82, 30 A.2d 718, 723 (1943); *Williams v. American Broadcasting Cos.*, 96 F.R.D. 658, 666 (W.D. Ark. 1983) (it is well established that recognition of a journalist's privilege is for the legislature.) If I were to accept plaintiffs' argument, I must invalidate Pennsylvania's longstanding practice of establishing rules of evidence and privilege by legislative action. I will not interpret Pennsylvania's constitution to require such a result.

Plaintiffs also argue that the shield law, as defendant interprets it, violates the due process guarantees of the Pennsylvania and United States Constitutions. Under the Pennsylvania constitution, protection of one's reputation is a fundamental right. Pa. Const. art. I, §1.[4] Although the constitution guarantees freedom of speech, it provides that a citizen is "responsible for the abuse of that liberty." *Id.* §7. The state's due process clause specifically provides for vindication of reputational interests in the courts: "All courts shall be open; and every man for an injury done him in his . . . reputation shall have remedy by due course of law." *Id.* §11.

Plaintiffs note that in order to prevail in this lawsuit they must prove defendant published false statements with "actual malice."[5] They claim that if they are barred from investigating defendant's outtakes, sources and editorial processes, they will be prevented from satisfying their heavy burden. Thus, they

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4. Section 1 provides: "All men . . . have certain inherent and indefeasible rights, among which are those of . . . . acquiring, possessing and protecting property and reputation."

5. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), requires proof of actual malice because, as I conclude in the second section of this option, plaintiff James Coughlin is a public official. If Coughlin were not a public official for *New York Times* purposes, as plaintiffs contend, plaintiffs concede that they must prove malice in order to recover punitive damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

claim, the shield law in effect makes it impossible for libel victims to recover and grants the media an absolute license to defame. They urge that such a result cannot be reconciled with the Fifth and Fourteenth Amendments to the United States Constitution or with Pennsylvania's constitutional right to vindicate one's reputation in the courts.

The Third Circuit has rejected the argument that a privilege which limits a plaintiff 's ability to uncover evidence in a defamation case deprives him of access to the courts. *Samuelson v. Susen*, 576 F.2d 546, 553 (3d Cir. 1978). In *Samuelson*, plaintiff was allegedly defamed during a medical review committee's proceedings. Such proceedings were privileged under an applicable Ohio statute. Plaintiff argued that the statute violated his Fifth and Fourteenth Amendment due process rights by depriving him of information central to his cause of action and in effect denying him access to the courts. *Id.* at 552. The Third Circuit upheld the state legislature's right to establish privileges in order to further important public interests. The court stated: "No doubt the statutory provisions affect the manner in which plaintiff may develop evidence to support his defamation claim. Plaintiff is not, however, foreclosed from prosecuting his claim with other evidence, both direct and circumstantial." *Id.* at 553. Plaintiff s due process argument, according to the court, was "attenuated." *Id.* Similarly, the Court of Appeals for the District of Columbia Circuit has held that there is "no due process right to offer evidence barred by the attorney-client privilege," even if the evidence is necessary to establish a defamation claim. *Rosen v. NLRB*, 735 F.2d 564, 577 (D.C. Cir. 1984). The court reasoned:

> The attorney-client privilege is but one of several privileges that prevent parties themselves from adducing particular evidence, and thus create an obstacle to fact finding due to the broad judgment that the value of introducing such evidence is outweighed by the harm inflicted upon other policies and values. The explicit burdens imposed by such evidentiary rules have never, to our knowledge, been held

> inconsistent with due process in the civil law context, because such burdens are simply a necessary consequence of society's attempt to balance the value of the complete admissibility of probative evidence with other competing values, such as the protection of vital professional or associational relationships.

Id. at 572. *See also Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (states may recognize a journalist's privilege, "either qualified or absolute").

The fact that protection of reputation is a fundamental right in Pennsylvania does not change the result. The supreme court of Pennsylvania, recognizing that even constitutional rights are subject to limitations, has held that certain public officials are absolutely immune from liability for defamation. *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952). According to the court:

> [N]either freedom of speech nor freedom to protect one's property and reputation — each of which is guaranteed by the [Pennsylvania] Constitution — is unlimited, and it is obvious that they must sometimes be competing and conflicting. . . . Even though the innocent may sometimes suffer irreparable damage, it has been found to be in the public interest and therefore sounder and wiser public policy to "immunize" public officials [from liability for defamation].

Id. at 202-03 88 A.2d at 899. *See also Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374, 380 (Pa. 1984). The Third Circuit in *Steaks Unlimited v. Deaner*, 623 F.2d 264, 277 n.62 (3d Cir. 1980), recognized that by protecting a media defendant's outtakes from discovery it was depriving the plaintiffs of important evidence. The court held, however, that it was bound by the Pennsylvania legislature's decision to provide broad protection to news sources. *Id.* at 279. According to the court, "to the extent a state chooses to authorize a cause of action for defamation, it may also limit the plaintiff's ability to prove his claim in order to promote other social purposes." *Id.* at 279 n.74.

Pennsylvania, like other jurisdictions, has established a number of conditional and absolute privileges applicable in defamation actions. Plaintiffs would have me second-guess the state's policy decisions and strike down an entire class of laws on the basis of an argument which the Third Circuit has characterized as "attenuated." I decline to do so.

Under Pennsylvania's shield law, defendant cannot be compelled to disclose information concerning outtakes, sources, or editorial processes. Plaintiffs also seek discovery with respect to the factual basis for the broadcast and defendant's efforts to verify its information. A review of the exhibits to plaintiffs' memorandum shows that plaintiffs have requested, and defendant has supplied, extensive material concerning defendant's investigation and the bases for the allegedly defamatory statements. Plaintiffs have not identified any specific factual information, other than that protected by the shield law, which defendant has failed to provide. Accordingly, plaintiffs' motion to compel discovery must be denied.

II.

Defendant Westinghouse has moved for summary judgment, claiming that the allegedly defamatory statements are not actionable and that plaintiffs cannot prove actual malice. Defendant's memorandum of law analyzes the broadcast statement by statement, purporting to show that the broadcast consisted of indisputably true statements, videotapes of actual occurrences, and protected expressions of opinion. In particular, Westinghouse defends the statement that Coughlin was carrying an envelope as an expression of I-Team reporters' subjective opinion. Defendant claims plaintiffs have produced no evidence from which it can be inferred that any KYW employee did not believe the statements in the broadcast to be true. Plaintiffs cannot, therefore, prove that defendant published the allegedly defamatory statements with "actual malice."

Plaintiffs claim that defendant has attempted to disguise the defamatory impact of the broadcast as a whole by analyzing each statement apart from its context. According to plaintiffs, the film

segments and accompanying narrative defamed Officer Coughlin by strongly implying that he had accepted a bribe. Plaintiffs also assert that Coughlin is not a "public official" for the purposes of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and thus need not prove malice in order to prevail. Plaintiffs argue, however, that the record contains ample evidence of malice. They claim that I-Team reporters were hostile toward the police because of earlier confrontations between members of the I-Team and the police department, and that the investigation on American Streets arose from a desire to discover official corruption. Reporters filmed police activities which could conceivably be interpreted as suspicious, and developed a broadcast on the basis of those activities. Although the I-Team's observations were made in October of 1981, and the broadcast was not aired until February of 1982, plaintiffs claim reporters made no realistic effort to determine whether innocent explanations existed for the videotaped activities. Plaintiffs also assert that the I-Team, in developing the broadcast, relied solely upon sources biased against the police and the Ukrainian-American Club.

Plaintiffs claim that a minimal investigation would have revealed that on October 11, 1981, Officer Coughlin was a rookie policeman patrolling alone for the first time. Early in his shift, he was ordered to investigate a vandalism complaint at the Ukrainian-American Club. After talking to the club's stewart, he returned to his patrol car and filled out a "48" book, used by police to file incident reports. He attributes his difficulty in starting the car to the fact that he had never driven a patrol car before that night. Plaintiffs object to the broadcast statement that the officer in car 35 did not appear to be Coughlin. According to plaintiffs, this statement implied that Coughlin had someone else surreptitiously take his place and fill out his reports while he was somewhere else, perhaps inside the club.

At approximately 2:45 a.m. on October 11, Coughlin was ordered to check serveral private clubs outside his assigned patrol area to ensure compliance with city liquor laws. He had never performed a club check before, and one of his fellow officers had to explain his duties to him in detail. At 3:57, after checking the clubs, he reported over police radio that he was

returning to headquarters. He then turned in his club check reports at headquarters and was sent to determine whether the Ukrainian-American Club had already been checked by another officer. Coughlin explains the events which the I-Team described as "suspicious" as follows: When he arrived at American Street, he saw another police officer driving away. He followed in order to ask whether the officer had checked the Ukrainian-American Club. After losing sight of the patrol car, he returned to the club. He went inside, learned that another officer had just checked the club, and left immediately. He claims that the object in his hand was a 48 book. He also asserts that the officers in his district were not required to wear uniform jackets that night.

Coughlin describes the I-Team's attempt to interview him on February 10, 1982, as an "ambush." According to Coughlin, when he returned from work early that morning two men confronted him outside his house. One was operating a television camera and the other began to question Coughlin about his activities on October 11, 1981. Coughlin claims he was unnerved by the camera and by the abrupt questioning. The reporters refused to turn the camera off, and Coughlin therefore refused to answer their questions.

In order to be entitled to summary judgment, defendant must show that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The first question presented by defendant's summary judgment motion is whether the challenged statements are capable of defamatory meaning. Under Pennsylvania law, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 442, 273 A.2d 899, 904 (1971) (quoting Restatement of Torts §559 (1938)). The allegedly defamatory statements must be read in context:

> The test is the effect the [communication] is fairly calculated to produce, the impression it would naturally engender, in

> the minds of the average persons among whom it is intended to circulate. The words must be given by judges and juries the same signification that other people are likely to attribute to them.

Id. at 447, 273 A.2d at 907 (quoting *Boyer v. Pitt Publishing Co.*, 324 Pa. 154, 157, 188 A. 203, 204 (1936)). *Accord Marcone v. Penthouse International*, No. 84-1004, slip op. at 8 (3d Cir. Feb. 6, 1985).

Defendant's broadcast is clearly capable of a defamatory meaning. The broadcast outlined the apparent law enforcement problems on American Street and, quoting a 1974 Pennsylvania Crime Commission Report, characterized the situation as "ripe for corruption." The narrator described the police activities filmed on October 11, 1981, as "the most suspicious activity we saw on American Street." The subsequent films and descriptions of Officer Coughlin, considered in the context of the entire broadcast, are reasonably susceptible to the interpretation that Coughlin accepted a bribe. The I-Team's presentation of its attempt to interview him reinforced the implication that he was evasive and therefore guilty of corrupt activities. Because I conclude that the broadcast is capable of a defamatory meaning, it would be for a jury to determine whether that meaning was conveyed to the broadcast's audience. *Corabi*, 441 Pa. at 442, 273 A.2d at 904.

Defendant also seeks summary judgment on the ground that the broadcast was substantially true. Defendant argues that each allegedly defamatory statement was either true or a protected expression of opinion. Under Pennsylvania law, however, allegedly defamatory words must be read in context. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978). The literal accuracy of individual statements will not insulate a defendant from liability where the overall impression left by those statements is false. According to the Pennsylvania Superior Court, " 'true facts' that in context imply a falsehood are, in an action for defamation, not 'true.' " *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. Ct. 475, 491, 448 A.2d 6, 15 (1982). Thus, it is not sufficient for

defendant " 'to take every sentence separately and demonstrate its individual accuracy, detached and wrenched out of context.' " *Id.* at 493, 448 A.2d at 15-16 (quoted *Clark v. Pearson*, 248 F. Supp. 188, 191 (D.D.C. 1965)).

I have already determined that the broadcast can reasonably be construed as implying that Officer Coughlin was involved in corrupt activities. Plaintiffs have presented evidence, including the affidavit of Coughlin himself and the testimony of other police officers, that this implication was false. Defendant has not seriously challenged plaintiffs' explanation for the events of October 11, 1981. In fact, on February 20, 1982, KYW aired a follow-up program during which the president of the Fraternal Order of Police presented Coughlin's version of those events. I conclude that there is a genuine issue of fact concerning the truthfulness of those segments of the broadcast dealing with Coughlin.[6]

Defendant's final argument is that plaintiffs must show "actual malice" on its part in order to prevail. Defendant contends that the record contains no evidence of malice, and that it is therefore entitled to summary judgment. Plaintiffs claim that Officer Coughlin, the target of the alleged defamation, is not a public official required to prove malice under *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Courts have consistently treated police officers as public officials within the meaning of *New York Times*. *See, e.g., Time, Inc. v. Pape*. 401 U.S. 279, 284 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968); *Henry v. Collins*, 380 U.S. 356 (1965); *Cibenko v. World Publishers*, 510 F. Supp. 761., 765 (D.N.J. 1981); *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super.

6. The Pennsylvania Supreme Court has recently held, in a defamation case involving a private figure plaintiff, that the defendant bears the burden of proving an allegedly defamatory statement to be true. *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374 (Pa. 1984). Although it is arguable that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requires the plaintiff, at least when plaintiff is a public official or public figure, to bear the burden of proving falsity, I need not decide the issue at this time. Regardless of which party bears the burden of proof, there is a genuine issue of fact as to the truth or falsity of the broadcast.

Ct. 475, 493-94, 448 A.2d 6, 16 (1982). Police officers qualify as public officials because:

> They "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," . . . . and their position "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. . . ." The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public officials.

Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966)) (citations omitted).

Officer Coughlin is a public official[7] and the broadcast related to his official conduct. Plaintiffs must therefore prove that defendant aired the broadcast with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80.

Plaintiffs argue that the I-Team's hostility toward the police, its reliance on biased sources and its failure to investigate establish the existence of actual malice. Viewing the evidence in

7. Plaintiffs, relying upon *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), argue that Coughlin is not a "public official" because he did not thrust himself into a public controversy and does not have significantly greater access to the media than a private citizen has. Under *Gertz*, however, those factors are relevant only to the question of whether a plaintiff who does not qualify as a public official is a "public figure." *Id.* at 351-52. Because I conclude that Coughlin is a public official under *New York Times*, I need not reach the question of whether he is public figure.

the light most favorable to plaintiffs, as I must under Fed.R.Civ.P. 56, I agree that defendant's reporters showed little concern for the truth when they developed "After Hours on American Street." I cannot conclude, however, that plaintiffs have set forth sufficient evidence of malice to withstand defendant's motion for summary judgment.

Under *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), the evidence must "permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication." (Emphasis added.) Malice cannot be inferred from a reporter's general hostility toward or bias against a subject.[8] *Natural Association of Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974) ("hatred, spite, ill will, or desire to injure" is not an element of the malice required by *New York Times*); *Rebozo v. Washington Post Co.*, 637 F.2d 375, 380 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). Absent a showing of reckless indifference to the truth, evidence that an investigation was "designed to confirm a hostile premise rather than to find the truth" does not establish malice. *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1173 (S.D.N.Y. 1984). *Accord Herbert v. Lando*, 596 F. Supp. 1178, 1224-26 (S.D.N.Y. 1984). As Judge Leval noted in *Westmoreland*, "[r]eporters of course investigate where their suspicions lie. A previously formed belief rebuts as much as it establishes constitutional malice, as it tends to demonstrate sincerity." 596 F. Supp. at 1174. Evidence of failure to investigate, even if it establishes that defendant was indifferent to the truth of an allegedly defamatory communication, is also insufficient to show that defendant acted with malice. *St. Amant*, 390 U.S. at 733; *Marcone v. Penthouse International*, No. 84-1004, slip op. at 32-34 (3d Cir. Feb. 6, 1985); *Dickey v. CBS, Inc.*, 441 F. Supp. 1133, 1141 (E.D. Pa. 1977), *aff'd*, 583 F.2d 1221 (3d Cir. 1978).

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8. Even if hostility were a factor in determining malice, I perceive little, if any, evidence in the record that the I-Team's investigation was motivated by ill will. Plaintiffs' claim that hostility existed is undercut by the consistent testimony of both KYW personnel and police officers that, despite occasional differences of opinion, the relationship between KYW and the police department was basically amicable.

Defendant's employees, by affidavit and in deposition testimony, assert that the allegedly defamatory statements consisted of inferences drawn from observed facts and accurate reports of complaints made by the Ukrainian-American Club's neighbors. They claim they honestly believed the officer who dealt with the club's vandalism complaint at 12:50 a.m. on October 11, 1981, was not Coughlin, and that the object in Coughlin's hand when he left the club shortly after 4:00 a.m. was an envelope. In addition, they claim that they merely presented their perceptions as to the facts, and left the audience to draw its own conclusions based upon the film clippings and accompanying narrative.[9]

The absence of intent to defame, of course, does not shield a defendant from liability for defamation. *St. Amant*, 390 U.S. at 732. Moreover, a jury could clearly find that the I-Team was at least aware that the broadcast could be interpreted as implicitly accusing Coughlin of corrupt activities. The evidence which would support such a finding, however, would not support a finding that defendant's employees did not believe their implicit accusations were true, or that they acted with reckless disregard for the truth. Plaintiffs have not set forth evidence sufficient to create an issue as to whether defendant's statements were "so inherently improbable that only a reckless man would have put them in circulation." *Id.* In fact, the evidence relevant to the state of mind of defendant's employees indicates that, although they did not seriously explore other possible explanations for

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9. *See* Deposition of Pasquale L. Polillo at 85-87 (May 3, 1984). Polillo, the General Manager of KYW-TV, gave final approval to the broadcast. Plaintiffs contend that Polillo admitted defendant knew the broadcast's implications concerning Coughlin were false, but aired the broadcast for the sake of "impact." I have reviewed Polillo's testimony and find no support for plaintiffs' interpretation. Polillo testified that he had not felt it necessary to verify what was in Coughlin's hand, because the public could "make up its own mind" concerning what the videotape showed. He also stated, however, that he had had no basis for suspecting anything in the broadcast to be inaccurate, and that he had personally believed that Coughlin was holding an envelope. Although Polillo's remarks may show that defendant did not conduct a thorough investigation, they cannot reasonably be construed to show that defendant acted with reckless disregard of the truth.

Coughlin's behavior, the conclusions which they drew based on their observations were reasonable.

The I-Team's investigation began as the result of persistent complaints concerning illegal and disruptive activities at the club. Reporters observed activities which they felt were inconsistent with proper law enforcement. Their suspicions were reinforced by a 1974 Pennsylvania Crime Commission report, which noted the potential for corruption that exists when police officers monitor private clubs. Barbara Bailey, an attorney who supervised the Crime Commission's 1974 investigation, confirmed that the activities shown in the I-Team's videotapes were similar to activities which had raised the Crime Commission's suspicions in 1974.

Representatives of the Philadelphia Police Department also agreed that the activities videotaped on October 11 raised questions concerning whether the police officers involved were performing their duties. Deputy Police Commmissioner Robert Armstrong was sufficiently concerned with the possibility of corruption that he ordered an internal investigation of Coughlin's activities. Commissioner Armstrong testified at his deposition that he personally believed the I-Team's films showed Coughlin with a 48 book in his hand. He stated, however, that it was not unreasonable to conclude that the object in Coughlin's hand was an envelope. In fact, he noted that the police department, after conducting interviews and laboratory tests and consulting with the FBI, had been unable to reach an official conclusion concerning the object's identity. In addition, Commissioner Armstrong, together with other members of the Philadelphia Police Department, testified that Coughlin had not followed department procedures with respect to his log book entries and his uniform.

As I have already determined, a jury could find that Coughlin's actions were due to inexperience, not corruption. An issue also exists as to whether the I-Team, with a minimum of effort, could have discovered the truth. The Supreme Court's mandate, however, is clear: "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S.

at 731. The evidence in this case would not support a finding that the I-Team's interpretation of Coughlin's behavior as indicative of corruption was so unreasonable as to give rise to an inference of actual malice. *See Marcone*, slip op. at 36 (actual malice not shown when "mistakes appear to be the result of insufficient editorial verification and checking procedures, but not of a conscious decision to present [plaintiff] in a false light.") The fact that the broadcast was not "hot news" and defendant had time to investigate is not sufficient to demonstrate the existence of malice. *See Dickey v. CBS, Inc.*, 583 F.2d 1221, 1228 n.9 (3d Cir. 1978); *Barger v. Playboy Enterprises*, 564 F. Supp. 1151, 1156 (N.D. Cal. 1983), *aff'd mem.*, 732 F.2d 163 (9th Cir.), *cert. denied*, 53 U.S.L.W. 3239 (U.S. Oct. 10, 1984). The Supreme Court in *St. Amant v. Thompson*, 390 U.S. at 731-32, noted that its definition of malice as subjective awareness of falsity:

> may be said . . . [to] put[ ] a premium on ignorance, encourage[ ] the irresponsible publisher not to inquire, and permit[ ] the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concedely the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

I note that the parties have presented opposing viewpoints as to the propriety of granting summary judgment where the presence of "actual malice" is at issue. Defendant argues that,

because interests protected by the First Amendment are at stake, summary judgment is particularly appropriate. Defendant quotes *Bose Corp. v. Consumers Union*, 52 U.S.L.W. 4513, 4520 (U.S. Apr. 30, 1984):

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Plaintiffs rely upon *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), for the proposition that "proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition."

I am not persuaded that the special proof requirements enunciated in *Bose* should apply at the summary judgment stage. *Bose* dealt with the function of an appellate court reviewing a finding of actual malice in a defamation case. The Supreme Court held that the sensitive constitutional interests at stake necessitated stringent and independent appellate review. The court's role is different at the summary judgment stage, which involves a preliminary inquiry into whether a plaintiff has raised triable issues of fact. Plaintiffs should not be compelled in effect to provide their entire case before trial. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1570-71 (D.C. Cir. 1984).

The question remains, however, whether under *New York Times Co. v. Sullivan* I must consider even the preliminary matter before me in light of plaintiff's ultimate burden of proof. *See* 376 U.S. at 285-88 (public official plaintiff must prove malice with "convincing clarity;" evidence which would support a finding of negligence may be insufficient to support a finding of actual malice). A number of courts have held that the degree of evidence which plaintiffs must present will affect defendant's ability to show, as required by Fed.R.Civ.P. 56, that no genuine issues of material fact exist. Under this approach, the propriety

of granting summary judgment depends upon whether, "viewing the evidence and all inferences arising therefrom in the light most favorable to the plaintiff, there appears a genuine issue of fact from which a jury could reasonably find actual malice with convincing clarity." *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. Ct. 588, 601, 422 A.2d 625, 632 (1980). *Accord Yiamouyiannis v. Consumers Union*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980); *Bryant v. Associated Press*, 595 F. Supp. 814, 818 (D.V.I. 1984); *Nader v. de Toledano*, 408 A.2d 31, 49-50 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

It is difficult to determine from the single footnote in *Hutchinson v. Proxmire*, 443 U.S. at 120 n.9, how the Supreme Court will ultimately decide this issue. I interpret that footnote, however, as indicating that courts should not form what amounts to a presumption favoring summary judgment in order to protect a defendant's First Amendment rights. *See Steaks Unlimited v. Deaner*, 623 F.2d 264, 275 n.56 (3d Cir. 1980). I do not believe that the Supreme Court intended to preclude the use of summary judgment, when appropriate under a neutral application of Rule 56, to dispose of "potentially frivolous suits that threaten First Amendment freedoms." *Brophy*, 281 Pa. Super. Ct. at 599, 422 A.2d at 631. Defendant Westinghouse has shown, as required by Rule 56, that no genuine issues of material fact exist. I will therefore grant defendant's motion for summary judgment.

Defendant is also entitled to summary judgment with respect to plaintiffs' remaining claims. Because Coughlin is a public official, plaintiffs must prove malice on defendant's part in order to prevail on their claim that the broadcast portrayed Coughlin in a false light. *See Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967); *Goldman v. Time, Inc.*, 336 F. Supp. 133, 137-38 (N.D. Cal. 1971); Restatement (Second) of Torts §652E(b) and comment d (1977). My determination that the evidence would not support a finding of malice requires that I grant summary judgment as to plaintiffs' false light claim. Plaintiffs' claim for punitive damages falls on the same basis. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (plaintiff must prove malice in order

to recover punitive damages). Similarly, I do not perceive sufficient evidence to support plaintiffs' claim that defendant is liable for intentional infliction of emotional distress. Liability for emotional distress can be found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts §46 comment d (1977). Even proof of malice or intent to inflict emotional distress is an insufficient basis for liability. Because the evidence would not support a finding that defendant's conduct was extreme or outrageous, I must grant summary judgment as to plaintiffs' claim for emotional distress. *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1274 (3d Cir. 1979).

Defendant has also demonstrated that no genuine issue of fact exists with respect to plaintiffs' claim for invasion of privacy. Under Pennsylvania law, an invasion of privacy action can be brought on any one of four grounds: "(1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) publicity given to private life, and (4) publicity placing a person in a false light." *Martin v. Municipal Publications*, 510 F. Supp. 255, 259 (E.D. Pa. 1981). *Accord Vogel v. W.T. Grant Co.*, 458 Pa. 124, 129 n.9, 327 A.2d 133, 136 n.9 (1974). Plaintiffs allege that defendant's broadcast is actionable on the third and fourth grounds. I have already determined that plaintiffs' false light claim is not viable. Plaintiffs' claim that defendant publicized Coughlin's private life must also fall, because the broadcast dealt with Coughlin's public activity as a police officer. A police officer's on-the-job activities are matters of legitimate public interest, not private facts. A publication dealing with those activities thus cannot be the basis for an invasion of private action. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-95 (1975); Restatement (Second) of Torts §652D and comments b, d (1977).

Finally, because I have determined that James Coughlin has no viable claim against defendant, Patricia Coughlin's derivative claims must also fall. A wife's claim for loss of her husband's consortium depends upon proof that an actionable wrong was committed against her husband. *Little v. Jarvis*, 219 Pa. Super. Ct.

156, 162, 280 A.2d 617, 620 (1971). *See also Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Defendant is therefore entitled to summary judgment with respect to Patricia Coughlin's claims.

III.

The task of balancing plaintiffs' interest in vindicating James Coughlin's reputation against defendant's First Amendment rights is a difficult one. With respect to plaintiffs' discovery motion, however, the balance has already been struck in defendant's favor by the Pennsylvania Shield Law. Because of the broad privilege which the shield law grants to media defendants in defamation cases, I must deny plaintiffs' motion to compel discovery. Moreover, I am constrained under recent Supreme Court and Third Circuit precedent to conclude that no genuine issues of fact remain in this case and that defendant is entitled to a judgment as a matter of law. I will therefore grant defendant's motion for summary judgment.

_____

Ch. J.

Supreme Court, U.S.
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No. 85-1593

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

COUGHLIN, JAMES and COUGHLIN, PATRICIA, his wife,

Petitioners,

v.

WESTINGHOUSE BROADCASTING AND CABLE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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PARTIES TO THE PROCEEDING

The parties to this proceeding are James Coughlin, Patricia Coughlin, and Westinghouse Broadcasting and Cable, Inc., a wholly-owned subsidiary of Westinghouse Electric Corporation.

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IN THE

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October Term, 1985

No. 85-1593

COUGHLIN, JAMES and COUGHLIN,
PATRICIA, his wife,

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v.

WESTINGHOUSE BROADCASTING
AND CABLE, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

Respondent Westinghouse Broadcasting and Cable, Inc. respectfully submits that the petition for certiorari should be denied because it raises no questions of compelling significance that merit this Court's attention. The decisions below did no more than to apply the definition of actual malice to which this Court has adhered for a quarter century and to resolve a discovery issue in full accordance with Pennsylvania law. The petition thus does not present any misapplication of current law or conflict among decisions, but only petitioners' desire to change that law. However, the facts of this case present no compelling reason to do so.

STATEMENT OF THE CASE

This is an action for libel. Petitioner James Coughlin, a Philadelphia police officer, contends that Westinghouse defamed him in a television broadcast dealing with police corruption in connection with a club that acted as an "after-hours" bar in Philadelphia. A portion of the broadcast showed Coughlin leaving the club at about 4:00 A.M. carrying an object that appeared to be an envelope. Coughlin claims that the report made him appear to be corrupt. After extensive discovery, the district court entered summary judgment in favor of Westinghouse. It held that, although the truth of the broadcast statements about Coughlin was disputed, Coughlin had failed to submit evidence sufficient to create a genuine issue of fact in support of the claim that Westinghouse broadcast the statements with actual malice. A. 37-45.* The court of appeals affirmed without dissent. A. 2-24.

Petitioners' ten-page "Statement of the Case" contains a series of misstatements, half-truths, and innuendos that are unsupported by the record or the opinions below and that falsely portray the state of the record. Rather than engage in a point-by-point refutation, this brief will outline the essential facts material to the issues raised in the petition.

In 1981, residents of a Philadelphia neighborhood complained to Westinghouse's television station in Philadelphia, KYW-TV, about "illegal and disruptive activities" (A. 42) at a private club on American Street and about the failure of the police and state liquor authorities to remedy the misconduct. KYW investigated the situation for many months, and conducted surveillance of the club from a low-light camera in a van and,

*Pages with an "A." prefix are in the appendix to the petition for certiorari. Pages with an "S.A." prefix are in the supplemental appendix bound with this brief in opposition to the petition.

later, at a window in a neighbor's house. The investigation revealed that the club served liquor to persons after 3:00 A.M., the time at which it was required to close under state law; that persons leaving the club after those hours often were rowdy and disruptive and disturbed the peace of the neighborhood; and that police officers frequently visited the club while liquor was being served after 3:00 A.M. without making arrests, reporting violations, or otherwise correcting the misconduct or following police directives relating to club checks.

As stated by the district court (A. 42), the reporters felt that the activities they observed were inconsistent with proper law enforcement. Their suspicions were reinforced by a 1974 Pennsylvania Crime Commission report that noted the potential for corruption that exists when police officers monitor private clubs. The supervisor of the Crime Commission's investigation confirmed that the activities videotaped by KYW were similar to those discussed by the Commission.

The portion of the KYW report relating to Coughlin dealt with events on the morning of October 11, 1981. KYW's surveillance camera recorded persons entering the club after 3:00 A.M. At 3:52 A.M., a police officer (not Coughlin) entered the club, stayed for five minutes, and then left while about 50 people remained inside; contrary to police regulations, he did not inform the police radio of his whereabouts. At 4:04 A.M., he returned to the club (again without informing police radio) and stayed until 4:11 A.M. Meanwhile, Coughlin told the police radio dispatcher to "hold him out" at headquarters for paperwork. Soon after the other policeman left the club, Coughlin drove up to the club, slowly backed up, looked over the street, and drove off. Coughlin returned several minutes later. He entered the club at 4:17 A.M., without reporting to police radio and without donning his standard uniform attire (jacket, hat, and nightstick). Less than a minute later, he exited the club carrying a

paper object in his hand that two KYW reporters who were eyewitnesses identified as an envelope.

KYW obtained the police logs and incident reports of Coughlin and the other policeman observed at the club on October 11. The logs did not show the policemen at the Club at the times the KYW camera recorded them there. Coughlin's log book showed a twenty-minute gap for the period he was at the club.

KYW asked to interview the police officers seen on the videotape. The Police Department refused to arrange interviews, but granted permission for KYW to approach the policemen outside of formal channels. Coughlin had been informed by the Police Department of accusations that he had taken an envelope from the club, and he had heard rumors of the KYW investigation. On February 10, 1982, KYW went to his home to interview him as he returned from work, but Coughlin refused to be interviewed. Although the petition for certiorari (at 9, 12) asserts that Coughlin was not given a reasonable opportunity to state his side of the story, Coughlin himself testified during his deposition that he made a voluntary decision not to talk to KYW.

Though unable to talk with Coughlin, KYW interviewed a number of police officials, including the Police Department's deputy commissioner, chief inspector, and public information officer. Interviews also were held with neighborhood residents and their counsel; present and former officers of the club; state liquor authorities; the Philadelphia district attorney, and a Pennsylvania Crime Commission lawyer who said that the events recorded by KYW suggested that Coughlin "was not involved in official business" (S.A. 23-24).

KYW aired the investigative report, entitled "After Hours on American Street," on February 17 and 18, 1982, and repeated segments of the report along with follow-up interviews on February 19. The transcript of

the report is very lengthy, but pertinent excerpts are appended to this brief as a supplement. The report included the videotape of Coughlin made on October 11 and described those events as "the most suspicious police activity [KYW] saw on American Street." S.A. 15, 19. While showing Coughlin exiting the building with a paper object in his hand, the report noted that Coughlin had told the police dispatcher that he was out at headquarters doing paperwork and added, "Well, the only paperwork we saw him doing was carrying this envelope out of the club less than a minute after he went in." S.A. 16, 20. On the February 19 telecast, KYW interviewed Tom Garvey, the president of the Fraternal Order of Police, on the air and asked him about the police conduct shown in the report. Garvey responded that Coughlin had been a rookie cop who did nothing wrong and that the object that had been shown in his hand was a police incident report log (or "48 book"), not an envelope. S.A. 28-29.

The Police Department then conducted its own investigation of the events reported by KYW. Using laboratory tests on the videotape, among other things, it, along with the Federal Bureau of Investigation, tried to identify definitively the object in Coughlin's hand, but they were unable to reach an official conclusion concerning its identity. A. 42. Police officials concluded that the object reasonably could be said to look like either a "48 book" or an envelope. *Id.* The Police Department's internal charges against Coughlin have not been decided.

Coughlin sued for libel, claiming that the KYW report falsely accused him of taking a bribe. His wife sued for loss of consortium. The parties engaged in extensive discovery, including 36 depositions, a large number of interrogatories, and production of numerous documents. Westinghouse objected to a small segment of petitioners' discovery that sought material protected from disclosure under a Pennsylvania statute protecting news sources

and editorial materials. Petitioners moved to compel discovery, arguing that the statute infringed on their state and federal constitutional rights. The district court rejected that argument and denied the motion. A. 28-34.

At the close of discovery, Westinghouse moved for summary judgment, arguing primarily that the individual statements in the broadcast were true and that, in any event, there was no evidence that it had acted with actual malice. The district court held that the dispute about whether Coughlin was carrying an envelope or a "48 book" presented a genuine issue of material fact that precluded summary judgment on the truth issue. A. 37-38.

With respect to truth, the petition for certiorari contains repeated assertions that its version of the facts regarding what Coughlin was carrying is uncontroverted, pointing to the district court's statement (A. 38) that "Defendant has not seriously challenged plaintiffs' explanation for the events of October 11, 1981." Of course, since Westinghouse had moved for summary judgment, the rules of procedure precluded it from contesting factual issues while arguing its motion. Obviously, the factual version in the petition *is* disputed; KYW's reporters continue to believe that Coughlin carried an envelope, while Coughlin protests that he did not. That dispute is not at issue here, however.

The district court agreed with Westinghouse that petitioners were required to prove actual malice because Coughlin, as a police officer, was a public official. A. 38-39. Petitioners do not challenge that holding. The court declined to determine whether there was sufficient evidence to prove actual malice with "convincing clarity," holding that that standard applies only to trials, not summary judgment motions. A. 44-45, *citing Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 473 U.S. ____, 105 S. Ct. 2672 (1985) (No.

84-1602). Nevertheless, upon surveying petitioners' "evidence" of actual malice in light of the deferential summary judgment standard in Rule 56 of the Federal Rules of Civil Procedure, the court concluded that petitioners had failed to create even a triable issue of fact. Accordingly, the court entered summary judgment for Westinghouse. A. 39-43.

The court of appeals affirmed in a per curiam opinion that adopted the reasoning of the district court. A. 5. In a separate concurrence, Judge Becker agreed with that conclusion, and suggested that he reached that result after engaging in a plenary review of the record. A. 7, 24. The court of appeals sought extensive briefing on petitioners' complaint that they were denied discovery, focusing mainly on the validity of the Pennsylvania statute protecting sources and editorial materials in light of the right to reputation under the Constitution of Pennsylvania. It concluded that the statute "suffers from no state or federal constitutional infirmity." A. 6. After an extensive analysis of the state and federal constitutional arguments, Judge Becker agreed. A. 7-24. Petitioners did not seek rehearing.

REASONS FOR DENYING THE WRIT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS WARRANTING REVIEW OF THIS CASE BY THIS COURT.

The petition fails to state any grounds that merit review by this Court.

First, petitioners do not suggest that the decision below conflicts with decisions of this Court. Indeed, the petition studiously avoids reference to the decisions of this Court — particularly *St. Amant v. Thompson*, 390 U.S. 727 (1968) — that compelled the courts below to hold as they did.

Second, there is no conflict between the decision of the court of appeals in this case and that of any other court of appeals. Indeed, the petition concedes (at p. 15) that there is a dearth of authority supporting its position. The decision on which petitioners most heavily rely, *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), was vacated by the court that entered it and now is under reconsideration in banc. 763 F.2d 1472, 1481 (D.C. Cir. 1985).

Third, the decision below does not conflict with the decision of a state court of last resort. As Judge Becker's concurring opinion in the court of appeals (A. 7-24) demonstrates, the court of appeals was very sensitive to the holdings of the Supreme Court of Pennsylvania in deciding the due process issue advanced by petitioners in light of the competing interests at stake under state and federal law.

Fourth, the petition does not present novel questions of federal law and raises none of the issues now pending before this Court. Petitioners were not required to respond to an unsupported summary judgment motion. *Cf. Celotex Corp. v. Catrett*, No. 85-198. Nor were they required to meet a "convincing clarity" burden of proof. *Cf. Anderson v. Liberty Lobby, Inc.*, No. 84-1602.

Finally, petitioners have not and surely could not claim that the court of appeals engaged in a major departure from the accepted and usual course of judicial proceedings or sanctioned such a departure by the district court. In the district court, petitioners were given an opportunity to conduct discovery to the fullest extent permitted by Pennsylvania law. The procedure employed by the district court on summary judgment, including the standard of proof, was the most favorable that petitioners could have requested. The court of appeals fully reviewed the record; the judges viewed a videotape of the broadcast at issue, and, according to Judge Becker, performed a plenary review of the actual malice issue. *See* A. 24. Even though petitioners themselves deemphasized the discovery issue on appeal, the court of appeals asked for extensive supplemental briefing, and, as Judge Becker's opinion makes clear, considered the issue in depth. Thus, there was no departure from the proper course of judicial proceedings in this case, either in the district court or on appeal.

Petitioners make no effort whatsoever to explain what special and important reasons under Rule 17 of this Court justify issuance of a writ. They merely seek another review of the record, an unwarranted exercise in light of the correct application of current law to that record by the courts below. Petitioners do not like the current law and suggest that it should be changed. But that law is based on more than 25 years of First Amendment jurisprudence painstakingly crafted to balance the competing interests in this area. *See Philadelphia Newspapers, Inc. v.* Hepps, 475 U.S. ____, 54 U.S.L.W. 4373 (1986). The facts of this case do not merit reconsideration of those decisions.

Because petitioners have raised no special and important reasons justifying the attention of this Court, the petition for certiorari should be denied.

II. THE REASONS STATED BY PETITIONERS DO NOT PRESENT A SUFFICIENT LIKELIHOOD OF REVERSAL TO MERIT REVIEW BY THIS COURT.

A. The Courts Below Correctly Determined That Westinghouse Was Entitled to Summary Judgment Because There Was No Genuine Issue of Material Fact Relating to Actual Malice.

The main thrust of the petition is that the lower courts erred in concluding that petitioners had failed to present evidence of actual malice that would enable them to reach a jury. Petitioners contend that the courts below acted incorrectly in the way they employed the summary judgment rules or in applying the legal standards for actual malice. Neither contention has merit.

1. The courts below correctly applied the summary judgment rules to search for triable issues of fact.

The rules provide that summary judgment "shall be rendered forthwith if the [evidence shows] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As this Court emphasized just one month ago, to preclude summary judgment an issue of fact must be "genuine," and "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ____, 54 U.S.L.W. 4319, 4322 (1986).

Petitioners complain (at pp. 15, 21) that the courts below somehow departed from this standard and engaged in "factfinding," but they do not identify how the lower courts did so. The complaint that the lower courts

engaged in "weighing the evidence" (p. 15) seems to relate merely to the fact that they assessed petitioners' purported "evidence" of actual malice to determine whether it was sufficient to present to a jury. But that is precisely the courts' role under Rule 56. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Note, 28 U.S.C. App., p. 626 (1982 ed.); *see Matsushita, supra,* 54 U.S.L.W. at 4322.

The one example of "factfinding" that petitioners cite is a strained misconstruction of the district court's opinion. At page of 21 of the petition they complain about the district court's statement (A. 41-42) that "the evidence relevant to the state of mind of defendant's employees indicates that, although they did not seriously explore other possible explanations for Coughlin's behavior, the conclusions which they drew based on their observations were reasonable." In suggesting that that statement was a finding of fact, the petition takes the statement out of context. In making its statement, the district court was determining whether petitioners' evidence was "sufficient to create an issue as to whether defendant's statements were 'so inherently improbable that only a reckless man would have put them in circulation.' " A. 41, *quoting St. Amant v. Thompson,* 390 U.S. 727, 732 (1968). Assessing all of the evidence before it, the district court concluded that no rational jury could find that the alleged accusations of corruption were too unreasonable to be believed. That assessment was a matter committed to the district court's determination under Rule 56.

2. The courts below correctly applied this Court's decisions defining actual malice.

Petitioners do not contend that they submitted any evidence that Westinghouse acted with actual malice because it knew it was publishing false statements. Rather, they argue that a jury should have been permitted to determine whether Westinghouse acted with reckless disregard for the truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

This Court has explained this second prong of actual malice many times. Under it, "[u]tterances honestly believed" are protected, "even if [they are made] out of hatred," for "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). "[S]ubjective awareness of probable falsity" is necessary for this type of actual malice to exist." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974).

The district court faithfully applied these standards in assessing petitioners' "evidence" of actual malice. It looked for any evidence that Westinghouse doubted the truth of its broadcast or subjectively was aware that the broadcast probably was false. It found none. A. 39-45.

That Westinghouse did not act with actual malice is abundantly clear from this record. Not only is there no direct evidence of subjective doubts by Westinghouse personnel, but all of the facts point toward an effort by Westinghouse objectively to report a sincerely believed and believable story of great importance to the public. Eyewitnesses stated that Coughlin carried an envelope

out of the club, and the videotape image was fully consistent with that account. Those basic facts, together with additional evidence — *e.g.*, the concerns raised by a Pennsylvania Crime Commission report, the failure of the police to stop repeated incidents of misconduct and violations at the club despite frequent complaints, the objectively suspicious conduct of Coughlin in appearing to "case" the club area before returning to enter it, the false reporting by Coughlin of whereabouts different from the club and his failure to enter his stop at the club in his logbook, the similar failures of the other policeman at the club that night, the failure of Coughlin to report his entry into the club to the police radio dispatcher, and his entry of the club out of uniform — made any statements about Coughlin's conduct on October 11 completely justifiable.

In arguing that they presented evidence that would permit a rational jury to reach a contrary conclusion, petitioners completely ignore this Court's definition of what actual malice requires. Indeed, they do not even cite decisions such as *Garrison*, *St. Amant*, and *Gertz*. A quick review of the "evidence" on which petitioners rely makes clear that it has no bearing on whether Westinghouse had subjective doubts about the truth of its broadcast.

1. *The claim that Westinghouse harbored hostility toward the police (Pet. at 16).* All of the testimony on this subject is undisputed; both Westinghouse personnel and Police Department officials testified that there was no hostility. A. 40. Petitioners' "evidence" is no more than unsupported speculation — denied by both the police and Westinghouse — that hostility resulted from past incidents involving the police and reporters, such as the incident related in the petition (at 10-11) in which the police investigated the Westinghouse surveillance van on American Street in response to an anonymous tip. In any event, such "evidence" is immaterial, for preexisting hostility does not tend to establish subjective

doubts about the truth of a story. *See Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 281-82 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 9-11 (1970); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Garrison, supra*, 379 U.S. at 73-74, 77-79.

2. *The claim that Westinghouse failed properly to investigate the story although it could harm Coughlin's reputation and even though KYW was under no time pressure (Pet. at 16-18).* Contrary to petitioners' rhetoric, the undisputed facts showed that Westinghouse's investigation was extensive. KYW interviewed a number of police officials. It tried to interview Coughlin, but Coughlin voluntarily refused. To this day no one has been able definitively to determine what was in Coughlin's hand on October 11. But even if KYW's investigation might have been more thorough, that fact would not show actual malice. Inadequacy of investigation is not proof of doubts about truth. *See St. Amant, supra*, 390 U.S. at 731; *New York Times, supra*, 376 U.S. at 288. That result should not change merely because the story is not prepared under time pressure and it results in a serious accusation; otherwise, a trial would have to be held in every libel case arising from investigative journalism leading to a potentially harmful charge.

3. *The claim that the conclusions drawn by Westinghouse in the broadcast "were invariably the most injurious speculations imaginable" (Pet. at 18-19).* There is no evidence that Westinghouse harbored doubts about the truth and then deliberately chose to select an interpretation of events adverse to Coughlin. *Cf. Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). Westinghouse's alleged interpretation of the events involving Coughlin on October 11 was, on the facts known to it, much more

reasonable than the story of negligent police work that Coughlin later offered to explain them. Because the First Amendment does not permit a media defendant to be condemned for drawing non-reckless, let alone reasonable, conclusions about the facts before it, this purported "evidence" can have no bearing on petitioners' case. As this Court stated in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a media defendant does not lose the "First Amendment's broad protective umbrella" merely because it chose " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities.' " 466 U.S. at 512-13, *quoting Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971).

4. *The claims of an "attempt to silence" Coughlin with an on-camera interview and of failure to retract accusations (Pet. at 19-20).* Coughlin could have spoken to KYW's reporters at any time, but, as he stated during his deposition, he voluntarily chose not to do so. The suggestion that Westinghouse sought to "silence" Coughlin by approaching him for the interview with a television camera is not a serious argument. As soon as someone came forward to express another view about Coughlin's conduct, Westinghouse broadcast that view on the air in prime time. S.A. 28-29 (interview of T. Garvey). Westinghouse's failure to retract its story after it was aired surely cannot be evidence that Westinghouse had serious doubts about the truth of its story before it was aired. *See New York Times, supra*, 376 U.S. at 286-87. Westinghouse has failed to retract because, to this day, petitioners' version of the truth has not been proven; even the FBI has been unable to determine what was in Coughlin's hand on October 11. A. 42.

None of petitioners' "evidence" is probative of a reckless disregard by Westinghouse for the truth. Taken either separately or in combination, the items listed by petitioners provide no basis upon which a rational jury could conclude that Westinghouse acted with actual

malice. This was the conclusion reached by the district court and the court of appeals, and it was fully consistent with the precedents of this Court.

B. This Case Presents No Cause for Doing Away With the Actual Malice Requirement.

Recognizing that their "evidence" is not really probative of actual malice as defined by this Court, petitioners suggest, timidly, that the actual malice standard itself should be reconsidered. Pet. at 13-14, 21. The offhand nature of the suggestion discloses that petitioners are hardly serious about it, and Westinghouse will not burden this Court with a lengthy response. This case does not warrant a reformulation of existing First Amendment law.

The actual malice requirement was fashioned to afford "breathing space" to free expression about public officials and public issues by precluding punishment of statements honestly believed to be true. *See New York Times, supra*, 376 U.S. at 271- 72. The Court recognized that a defense of truth does not fully satisfy this objective, for proof of truth often is difficult and inexact. *Id.* at 279. The Court has adhered to this view for nearly three decades. *See generally Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ____, 54 U.S.L.W. 4373 (1986).

This case illustrates the wisdom of the Court's reasoning. Although the truth of some aspects of Westinghouse's report remains contested and has eluded determination by law enforcement investigators, there is no doubt that the subject of the report was of immense public significance, and the record makes clear beyond any genuine dispute that Westinghouse acted with a sincere belief in its truth. Indeed, as a result of the report and law enforcement investigations caused by it,

the club featured in the report was closed by the authorities and police procedures were re-examined. The public interest could not be served by a change in the law that would deter such press investigations of police corruption and violations of law.

Petitioners do not state what changes they would make to current law that would not eviscerate First Amendment protections. While they quote from Justice White's opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. ____, 105 S. Ct. 2939, 2948-54 (1985), they carefully avoid mention of Justice White's suggestions that actions for damages be replaced with declaratory judgment proceedings to determine truth and that strict limitations be placed on damage awards. Petitioners wish to recover substantial compensatory and punitive damages in this case.

Petitioners' argument is nothing more than the tired refrain of many unsuccessful plaintiffs — that the law should be changed to permit them to recover. This case does not merit a wholesale re-examination of libel law under the First Amendment, and certiorari should not be granted to entertain petitioners' suggestion.

C. There Is No Merit to the Contention That an Evidentiary Privilege for Reporters' Materials Deprives Petitioners of Due Process of Law.

Petitioners' final argument is that this Court should declare shield statutes unconstitutional in libel cases. Not surprisingly, petitioners cite no authority that ever has held a shield statute or any other evidentiary privilege invalid in a case such as this one, and, so far as Westinghouse can determine, no such authorities exist. Petitioners' argument is without merit.

The Pennsylvania Shield Law, 42 Pa. C.S. § 5942, provides that the press may not be required to disclose the sources of its information. It is just one of a number

of Pennsylvania enactments that create evidentiary privileges to foster an important interest in the confidentiality of certain types of communications and information. As Judge Becker noted in his opinion in the court of appeals (A. 23), at least 26 states have shield statutes. The district court's application of the Pennsylvania Shield Law in this case was fully in accord with decisions of the Supreme Court of Pennsylvania. *See Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984), *rev'd on other grounds*, 475 U.S. ____, 54 U.S.L.W. 4373 (1986); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

Petitioners suggest that the Shield Law is unconstitutional as applied in libel cases because it makes it difficult for plaintiffs to obtain evidence of actual malice, thereby depriving them of their right to reputation under the Constitution of Pennsylvania without due process of law. Much of petitioners' argument is devoted to establishing that they have a state-created liberty or property interest in reputation, a fact not disputed by Westinghouse. However, as Judge Becker explained in his thorough analysis of the question (A. 9-18), the Pennsylvania constitutional right to reputation is not itself infringed by the Shield Law or its effect on proving actual malice. *Accord, Hatchard v. Westinghouse Broadcasting Co.*, ____ Pa. Super. ____, 504 A.2d 211 (1986), *pet. for allowance of appeal filed*, No. 173 E.D. Allocatur Dkt. 1986 (Pa., Feb. 24, 1986).

The result is no different under the federal due process clause. This Court already has observed that states deserve wide deference in their decisions to enact shield laws (*Branzburg v. Hayes*, 408 U.S. 665, 706 (1972)), and petitioners have offered no reason to interfere with the state enactments. As Judge Becker concluded in his analysis of the due process question (A. 18-24), the Shield Law and its effect on proving actual malice do not deprive anyone of reputation. While the Shield Law may

make proof of actual malice more difficult, it does not make such proof impossible. *See Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, *cert. denied*, 459 U.S. 907 (1982). Any risk created by the statute that libel plaintiffs will be unable recover damages for harm to reputation is more than outweighed by the substantial free press interests that Pennsylvania has sought to advance by enacting it. *See* A. 23-24. *Cf. Philadelphia Newspapers, supra*, 54 U.S.L.W. at 4376 (Pennsylvania Shield Law's effect on obtaining evidence of truth is not sufficient to alter requirement that plaintiff has burden of proving falsity).

Moreover, in this case the limitations placed on discovery because of the Shield Law were, at most, minimal. The three dozen depositions and other extensive discovery afforded petitioners an ample opportunity to find evidence of actual malice, if any existed. Petitioners' one example of potential evidence of actual malice that they claim they could not obtain because of the Shield Law is a blatant misrepresentation of the facts. At page 13, the petition suggests that Westinghouse relied on the Shield Law to preclude discovery by petitioners about the absence of a videotape that showed Coughlin entering the club on October 11 and that, petitioners say, would have shown that Coughlin was carrying a "48 book." In fact, however, Westinghouse told petitioners that no tape was made of Coughlin's entry, and it permitted petitioners to depose KYW's cameraman to inquire about what had happened. At that deposition, the cameraman explained that he was recording events at the club from a mounted camera at a window in a home across the street from the club; that he was in another room of the house when Coughlin pulled up to the club in his car; that as soon as he was aware of Coughlin's arrival, he ran to the room where the camera was mounted and got there in time to see Coughlin but not to videotape him; and that he then stayed at the camera and was able to videotape

Coughlin's exit a few moments later. The cameraman also testified that Coughlin had nothing in his hands when he entered the club. Petitioners' suggestion that Westinghouse hid behind the Shield Law to prevent discovery about this issue is entirely false.

In sum, the overstated difficulties of proof advanced by petitioners are not great enough to warrant invalidating a statute that at least 26 state legislatures have determined is necessary to foster freedom of the press. This issue lacks sufficient merit for this Court to grant certiorari to consider it.

CONCLUSION

The petition for certiorari does not present an issue that merits review by this Court, and it therefore should be denied.

Respectfully submitted,

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EXCERPT FROM BROADCAST ON FEBRUARY 17, 1982

* * *

[MAURY] POVITCH: And right now, after months of investigation, I-Team reporter Stan Bohrman is here tonight with a special report. It's called After Hours on American Street.

Stan.

MR. BOHRMAN: Maury, like many of the stories the I-Team has done, this one began with a simple telephone call from some people who needed help. They told us that their Center City neighborhood was being disrupted by an after-hours drinking club that appeared to be openly flaunting State liquor laws. They told us they had asked the police and the State Liquor Control Board for help, but they haven't gotten any. So they asked us to come to their street and look for ourselves, and look we did.

We took our hidden I-Team camera to their neighborhood, and we found out they were not exaggerating at all when they said they had a problem.

While we were on the street, we observed some very questionable activity by some members of the Philadelphia Police Department. We also discovered some serious questions about the way the LCB was doing its job.

You should know from the outset that this is a story that some people do not want you to see. But despite all the obstacles, the I-Team stayed with the story for almost a year, and now we want you to see it.

One final technical note on this. Much of the video tape of this report was shot with a special nighttime lens which records only in black and white, so don't worry about the color on your television set.

All right. Now, let's go after hours on American Street.

This is the 600 block of South American Street in Queen Village. Now, you wouldn't know it to walk down this street during the day, but a war has been going on here. By day, this peaceful block, wedged between South and Bainbridge Street, is a quiet residential neighborhood that appears to offer the finest in Center City living.

And while there are many shops and restaurants just steps away, the noise and congestion they sometimes bring very rarely spills over onto this block.

But in the middle of the night, after most of the people who live here have gone to bed, a light goes on in front of this building in the middle of the block. And that's when the problem starts.

Groups of people, often loud and boisterous, parade down the street headed for something called the Ukrainian American Citizens Association of South Philadelphia.

(Demonstration)

MR. BOHRMAN: Up until a year ago, this place was so quiet that some of the neighbors didn't even know there was a club here. But in the fall of 1980, a group of people who don't live on this block turned this place into a full-fledged after-hours drinking club, and that's when the battle lines were drawn.

The people who live here say that activity in the club has totally disrupted their lives and shattered the peace of the neighborhood. They also insist that the activities of the club violate the State's liquor laws.

The people who live on American Street used to think that the police or Liquor Control Board would help them solve their problems that they were having with the club. But after a year of complaining to both agencies,

they were beginning to wonder whose side they're on. And that's what prompted them to ask the I-Team to look into the situation here.

Now, to understand how the problem here developed, you have to know something about Pennsylvania's liquor laws. Under those laws, regular bars or taprooms must stop serving drinks at 2:00 in the morning. Only non-profit private clubs licensed by the LCB are allowed to serve liquor for an extra hour until 3:00 a.m.

The private clubs are supposed to be just that, clubs. They're not supposed to be fronts for bars.

To get a liquor license, the club must also have "some primary interest in activity to which the sale of liquor and beer is only secondary." Those and a host of other rules for clubs sound pretty strict. But as the people who live on American Street have learned, there's a big difference between strict rules and strict enforcement, and that's what has them hopping mad.

Phil Behr and his family moved in across the street from the club last summer. They had no idea what they were getting into.

MR. BEHR: I understand the club has a capacity of 100 people, but we've seen as many as 200 people in the club, and at one time. They were loud and rowdy. They had been drinking all night.

They often throw up in our yard, which is what happened last night. They often urinate in the streets. It's hardly civilized living.

MS. CASTINEIRA: Nobody can sleep at night in the street, nobody, because the noise is terrible. Police coming all the time, and fights in the street.

And we have the glasses and bottles and all this stuff in the front of the door. They urinate in my door. I saw it. And all those noises, we cannot sleep.

MR. BOHRMAN: Those complaints are nothing new. For more than a year, residents of American Street bombarded City and State officials with letters and phone calls.

And when they didn't get any results, they asked the I-Team to take a look at what they were living with, and take a look we did.

We set up our hidden camera several nights last year, and we found that the people who live here are right. You can hardly call this place a small ethnic social club or even an ethnic club at all.

Here's a sample of what we saw. Because it was shot with a special night lens, the pictures are in black and white.

3:00 a.m., Saturday, October the 10th, the quiet of American Street is shattered when a woman yells at her friends.

(Demonstration)

MR. BOHRMAN: A few minutes later, the neighbors were treated to this scene.

(Demonstration)

MR. BOHRMAN: At 4:00 a.m., a full hour after the club is supposed to be shut down, the residents of American Street are confronted with this scene.

(Demonstration)

MR. BOHRMAN: At 3:28 a.m., Saturday, October 17th, this man comes out of the club and shatters the early morning silence with his portable radio.

(Demonstration)

MR. BOHRMAN: The residents here who managed to fall asleep after that were reawakened a short time later by this rowdy bunch.

(Demonstration)

MR. BOHRMAN: Some of the club's patrons have used American Street as a public toilet.

And this gentleman left the club around 3:40 a.m. one night in February of last year and urinated on a neighbor's steps.

And this man came out of the club early on a Saturday morning last October and relieved himself on the street.

Apparently, his friend also regarded American Street as a public toilet.

Now, in case you are wondering, the club does have a bathroom. But, apparently, some of those patrons prefer the steps and sidewalks of American Street.

Neighbors here complained that they often have to hose down their front walks in the morning. And the I-Team found that despite repeated protests by the residents here, little has been done to stop people from leaving the club with beer bottles. A while later, this man walked out of the club with another beer bottle.

The problems here have all meshed together to make life particularly unpleasant for the residents here. Like this night last October, when we saw everything, the noise, the beer bottles and the drunks. It's 4:00 a.m. on a Sunday morning, and this man has obviously done his share of partying for the night. He was followed by this group, some of whom left with drinks in their hand. Someone already had left a beer bottle on the steps here.

(Demonstration)

MR. BOHRMAN: There was plenty of noise before his friends finally led this man down the street.

(Demonstration)

MR. BOHRMAN: When the club finally closed its doors almost ten minutes after four, these two men came out with their unfinished drinks. Now, more than an hour after legal closing time, peace and quiet finally settled on American Street.

(Demonstration.)

MR. BOHRMAN: The people who live on this street are basically law-abiding citizens who say they used to believe that local and State government would be responsive to their complaints. Last fall, the frustration of being ignored for more than a year got to be too much for some of them and they sent their own message to the club's operators.

Now, in the event that you have just joined us, I would like to remind you that you are watching a special investigative report by Channel 3's I-Team on this expanded edition of Eyewitness News.

And as we've shown you thus far in the report, the lives of the residents on the 600 block of South American Street in Queen Village has been disrupted for more than a year now by problems associated with an after-hours drinking club, a club that opened up right in the middle of their block.

Fed up with the drunkenness, the rowdiness, and the late night noise of the club's so-called clientele, the people who live on the street did what most of us would do, really, they asked the Police Department for help.

The trouble is that over the last year, the residents of American Street saw a lot of police officers at the club, but the problem there didn't go away; if anything, they got worse. And that's when some of the residents began to feel that some police officers were more interested in taking care of the club than in helping them restore peace and quiet in the neighborhood. And you'll see why

they feel that way, as we continue now with our special report, After Hours on American Street.

Dr. Judy Kodroff is a psychologist and college administrator. She lives in the house adjacent to the Ukrainian American Club, here in the 600 block of South American Street.

She told us that on many nights, the noise from the club was so bad, she couldn't sleep. In the fall of 1980, Dr. Kodroff began taking notes of the activity she saw in the street below her window, activity that sometimes involved Philadelphia Police Officers.

DR. KODROFF: When I got concerned about what police were going to be able — were going to do to help us was when the owner and the woman that was with him got into the police car and they drove away, and that was, I guess, about 4:15 one night.

After that, you know, I noticed a lot of other police officers going into the club and leaving the club during the time it was open, and also noticed that there were police cars when it wasn't open.

One night, I saw a police car come at — shortly after 4:00. And because I was curious as to what a policeman would be going in there at 4:00 for, I stayed up so that I could see when he left. And he didn't leave until 5:00 in the morning.

MR. BOHRMAN: Another neighbor, who said he was afraid to talk to us on camera, said that on two different days, he saw uniformed police officers at the club while it was being renovated. He said the officers appeared to be working for the club and were supervising the clean-up there.

But the incident that really got Dr. Kodroff worried took place on Valentine's Day of last year. She told us that as she watched from her window overlooking the

street in front of the club, she saw an encounter between several police officers and this man, Ken Adams, the club's manager. She told us the incident involved Adams, a female officer in car 35, and two male officers in cars C-111 and car 3A.

DR. KODROFF: 35 and C-111 went inside the club. And when they were in the club, Ken Adams came out and talked to 3A. When Ken went back in the club, C-111 and 35 came out, and C-111 got into a pretty heated argument. 3A banged his fist on the car and shouted — (beep) — a number of times, and then he said "this is my club."

My judgment of what that dispute was, was that C-111 had come to investigate something that had been reported to him that was going on in that club that made it necessary for him to look into what was happening there and that 3A did not want him to do that. That — that would have been my judgment of the argument.

MR. BOHRMAN: February, a year ago, we took our hidden I-Team camera to American Street to watch the police activity, but our initial efforts weren't very successful.

Someone apparently didn't want us watching, because at 2:00 a.m. on the morning of February 22nd, a woman called the police emergency number and made an anonymous and false complaint that a woman had been dragged screaming into our van. That false report resulted in seven police cars converging on the scene. Someone could have been injured in the incident since at least one police gun was drawn.

The officers got quite a surprise when cameraman Greg Meyer appeared in the door of the van.

(Demonstration)

VOICE: Do you have a woman in here?

MR. MEYER: No. We don't have anyone in here but a tape recorder and the camera the whole time.

VOICE: The whole time.

MR. MEYER: The tape recorder and the camera are on the entire time.

(Inaudible conversation)

VOICE: Is there a female in there?

MR. MEYER: No, there is not. There never was or ever will be.

(Inaudible conversation)

VOICE: Do you have a warrant? I object to this.

(Inaudible conversation)

VOICE: We didn't need a warrant.

VOICE: Can I make a phone call?

(Inaudible conversation)

VOICE: Okay. Now, who are you?

MR. MEYER: Greg Meyer.

VOICE: Let me see some identification.

(Inaudible conversation)

MR. BOHRMAN: That incident was investigated by the Police Internal Affairs Bureau.

Because she had witnessed the incident, Dr. Kodroff was questioned by detectives. She told them a lot more than they expected, and that led to a much wider investigation.

DR. KODROFF: I decided that I was going to tell them that I had called the I-Team because of the activity that was going on next-door.

MALE INTERVIEWER: Including the police activities?

DR. KODROFF: Absolutely, yes.

MR. BOHRMAN: Internal Affairs questioned all the officers involved in every incident Dr. Kodroff reported seeing from her window. In each case, the officers denied the incidents had taken place or gave a different version of the events.

Take the case of the police car Dr. Kodroff said she saw driving the club manager and a woman away from American Street one night in November of 1980. That was car 38. The officer assigned to that car that night denied ever being on American Street, and offered his written patrol log as evidence of that claim.

DR. KODROFF: When they drive under my window, the numbers on the police cars are written in — are printed in very large letters on the top, and it would have been 38.

MALE INTERVIEWER: And there's no doubt in your mind?

DR. KODROFF: Absolutely no doubt at all.

MR. BOHRMAN: Well, seeing is believing, as they say.

And in just a few moments, our I-Team hidden camera will show you some police officers at the Ukrainian Club, whose official patrol log show that they were somewhere else.

On April 28th of last year, Police Commissioner Morton Solomon issued a report saying the Department had investigated Dr. Kodroff's allegations of police misconduct at the Ukrainian American Club. He stated that

a two-week surveillance of the club by the Internal Affairs Unit "failed to reveal any evidence of police misconduct." Solomon did concede that some officers had spent unnecessary amounts of time in the club while performing club checks, adding that "the necessary corrective action" had been taken.

We asked Dr. Kodroff if she noticed any change on American Street after the investigation.

DR. KODROFF: For quite a long time, the police cars parked where I couldn't see the numbers. And I knew after that that there was still police going in the club because I would see them walking up from Bainbridge Street or from South Street, but I couldn't tell who the cars were.

MR. BOHRMAN: Dr. Kodroff and the other neighbors didn't know it when they told us about police activity that they saw at the club, but back in 1974, the Pennsylvania Crime Commission issued this report on police corruption in Philadelphia that described activities strikingly similar to what the residents saw.

In this 1974 report on police corruption in social clubs, the Commission noted that many of these clubs stay open for at least an hour after the legal 3:00 a.m. closing time, because that extra hour means a lot of money. "The temptation is great, and a number of clubs in Philadelphia cannot resist," the Commission stated.

The Commission also said the requirement that Philadelphia Police Officers enforce the 3:00 a.m. closing time "provides a situation ripe for corruption."

Back in 1974, the Crime Commission conducted extensive surveillances on clubs and came to this conclusion about how the police handled their duty to close them at 3:00 a.m.

VOICE: When the officers entered the club at 3:15 a.m., there was never any action on their part to close the club. Often they came, chatted with the owner, made some notations and left. It was, if anything, a sham performance of their duty, intended to provide a record in case questions of impropriety were raised in the future. It was obvious to the agents present that 4:00 a.m. was the intended closing time.

MR. BOHRMAN: The report cited a number of examples of clubs paying off police officers to ignore the 3:00 a.m. closing time.

Today, eight years after that report was issued, one of the principal complaints of the residents of American Street is that the Ukrainian American Club, in the middle of their block, has frequently stayed open after the legal closing time.

This is the Third Police District. Officers who work out of here patrol the neighborhood where the Ukrainian American Club is located. Captain Russell Taylor is the Third District Commander.

On March the 2nd of last year, he issued a written order instructing his men to enter the club at 3:30 a.m. and remain until all patrons left. That order superceded an earlier order that had set the time for the club check at 3:00 a.m.

Residents here were puzzled about why Captain Taylor would move the club check back to 3:30, since the law requires clubs to stop serving drinks at 3:00 a.m. It appeared to them that he had now, in effect, given the Ukrainian Club an opportunity to sell drinks for an extra half hour.

Captain Taylor declined to be interviewed for this report.

Early Saturday morning on the 10th of October, a police officer in car 314 showed up and entered the club at 3:31. Despite Captain Taylor's order that officers making the club check here were to stay until all the patrons had left, this officer left just four minutes later, making no effort to disperse this group on the street outside.

(Demonstration)

MR. BOHRMAN: At 3:57, car 314 returned to the Ukrainian American Club. You're watching him write on his patrol log. That's his official record of where he has been during his tour of duty.

Now, the Police Department told us that this officer's log sheet states that between 3:55 and 4:10 a.m., he was at two other locations in the Third District, not here at 610 South American Street. But as you can plainly see, he was here at the club. And at 3:59, he went inside.

(Demonstration)

MR. BOHRMAN: A few moments later, a noisy mass exodus began, almost a full hour after the legal closing time of 3:00 a.m.

(Demonstration)

MR. BOHRMAN: Finally at 4:12, the officer left the club and drove off after spending 15 minutes here. Now, remember, his log says he was never here during that time. That's what other police officers' logs showed in other cases; where Dr. Kodroff told the Internal Affairs Bureau she had seen officers hanging out here sometimes as late as 5:00 a.m.

Our camera was on American Street again early on Saturday, October the 17th. We saw four people enter the club after the 3:00 a.m. closing time. One of our I-Team reporters was also in the club on this night. The reporter had been admitted after the 3:00 a.m. closing time, and without the required membership card. Our

reporter also observed drinks being sold until 3:45. That's well past the 3:00 a.m. legal limit.

At 3:29 on this night, an officer from car 35 entered the club, stayed for one minute and left, again disregarding the written orders to remain until all patrons had left. Despite the fact that drinks were being served illegally when the officer checked the club, the Police Department told us he filed an official report of his visit indicating that nothing unusual took place that night.

Nothing unusual? Well, in a way, he may be right, you see, because as far as the residents who live around here are concerned, serving drinks here after hours really isn't unusual at all.

At 4:01 a.m., car 35 returned to the club. Although the officer got out of his car and went in, he failed to inform police radio of his presence here.

MR. FAIR: When the police officer arrives at a scene, he gives at least three pieces of information, the car number, the location, and the nature of — of the incident that he's going in on.

MR. BOHRMAN: Police officers are frequently reminded of that regulation by the police radio.

POLICE RADIO: Advisory to all police, patrol vehicles must notify radio of their arrival on all assignments by giving car number and the words "on location".

MR. BOHRMAN: The purpose of that regulation is to allow the radio room to keep track of available manpower and to protect police officers. If an officer is attacked or injured and fails to call in within a certain period, other units could be dispatched to his location to assist him.

Sources have told the I-Team that if an officer enters a location without telling radio where he is, he generally does not want it known that he's there.

On this occasion, police radio called for car 35 while he was in the club and got no response. And while the officer was in the club, patrons leaving were creating quite a racket out in the street.

(Demonstration)

MR. BOHRMAN: At 4:07, the officer left the club and walked to his car down the street. However, he did not report back into police radio as being available until 4:14.

So, once again, on this night, the police allowed the Ukrainian American Club to operate for almost a full hour after legal closing time.

But the most suspicious police activity we saw on American Street took place early Sunday morning on the 11th of October. We saw eight people enter the club after the 3:00 a.m. closing time. No police officer showed up here until car 39 arrived and an officer went in at 3:52. Five minutes later, the officer came out of the club and drove away. By our count, there were at least 50 people still in the club.

After the officer left, people started leaving, some of them carrying beer bottles, another sore point with neighbors who can't understand why the police had failed to stop this type of activity here.

Now, here's where things really start to get interesting. At 3:57, car 35 told the police radio to hold him out at headquarters for paperwork. Now, remember that number 35. You're going to see it in just a moment.

Meanwhile, at 4:04, car 39 arrives back on American Street, and the officer reenters the club, once again without informing police radio of his presence here. The Police Department told us that this officer stated on his official patrol log that he was at another location in the Third District at this time.

At 4:11, the officer in car 39 leaves the club and drives away. All the patrons have left and the club appears to be closed for the night. But then car 35 drives up. Remember, according to his call to police radio, he's at headquarters doing paperwork. Car 35 slowly backs up, looks over the street and drives off.

Seven minutes later, car 35 reappears outside the club, and the officer hurries inside. As far as police radio knows, car 35 is still out at headquarters doing paperwork. Well, the only paperwork we saw him doing was carrying this envelope out of the club less than a minute after he went in.

According to the Police Department, there's an unexplained 20-minute gap in car 35's patrol log for this time period on this night.

Early last month, word got around the Police Department that the I-Team had been on American Street with a hidden camera and had taped damaging video of officers at the club. Suddenly, there was a dramatic change in the way officers in the Third District were checking the club.

Phil Behr, who lives directly across the street, received a visit from a sergeant one night promptly at the 3:00 a.m. club closing hour.

MR. BEHR: He and another officer were on the street. One officer went inside the club at 3:00 to make sure that the club was operating under the rules and that no drinks were being served and that it was closed. The police have generally been coming at the closing hour and have been in the street telling people do not make noise and to behave properly.

But the problem I have is that why did it take a year for this all — all to come about.

MR. BOHRMAN: Another strange turn of events took place just one month ago, early Saturday morning, on the 16th of January, when undercover vice squad officers raided the club. They arrested club manager Ken Adams for serving nonmembers.

The Police Department told us that the raid resulted from a routine check of social clubs in the area. But the people that live here wonder where the vice squad was during the last year when they repeatedly complained to the Police Department about the liquor law violations here.

And as we have just shown you, these violations seem to have escaped the notice of the police officers who have been right here night after night checking the club.

Now, for those of you who may have joined us a little late, I would like to remind you that you are watching a special investigative report by Channel 3's I-Team on this expanded edition of Eyewitness News.

As we showed you earlier in this report, the residents of South American Street began to wonder just whose side the police were on. As the residents battled to eliminate the problems they were having with an after-hours drinking club on their block, and as you've just seen through the lens of our hidden I-Team camera, some of the police activity that's taken place on American Street raises some very serious questions, indeed. The police activity we video taped last October, the activity you just saw, is now the subject of a new investigation by the Police Department's Internal Affairs Bureau.

An investigation was ordered by Police Commissioner Morton Solomon after we told him what we had seen on American Street. We'd like to point out right here that Commissioner Solomon made every effort to respond to our questions about those incidents. And

those efforts included providing us with access to official records of the cars and officers that we video taped on American Street.

As the Chief of the Internal Affairs Bureau told us, Commissioner Solomon wants to know if the Department has a problem in the Third District; and if it does, he wants it cleaned up.

And a note here on the police officer we showed you leaving the club with an envelope on October 11th at 4:17 in the morning. That's the same officer who told police radio he was at headquarters doing paperwork and then showed up at the club. We attempted to interview that police officer, but he refused to talk to us.

We'll have more to show you about the police activity on American Street that night in a special follow-up report tomorrow on Eyewitness News.

* * *

EXCERPT FROM BROADCAST OF FEBRUARY 18, 1982, 5:30 P.M.

MR. BOHRMAN: We found, for example, that some officers had been showing up at the Ukrainian Club and spending time inside, while stating on their official patrol logs that they were somewhere else.

Now, as part of their regular patrol duty, police officers are supposed to enforce the State law that requires social clubs to stop serving drinks at 3:00 a.m. But our investigation showed that although police officers were present at the Ukrainian Club, they didn't seem to be doing much to enforce that law.

For example, on the morning of October 17th, we saw a police officer enter the club at 3:29, stay for a minute, and leave. He filed an official report of this visit indicating that nothing unusual had occurred at the club when he checked it. But we had a reporter inside the club that morning. And our reporter saw the club's bartender serving drinks until 3:45 a.m., well past the 3:00 a.m. limit.

The officer's failure to report or do anything about that activity is now the subject of a Police Department investigation.

But the most suspicious police activity we saw on American Street took place early Sunday morning on the 11th of October. We saw eight people enter the club after the 3:00 a.m. closing time. No police officer showed up here until car 39 arrived and an officer went in at 3:52. Five minutes later, the officer came out of the club and drove away. By our count, there were at least 50 people still in the club.

(Demonstration)

MR. BOHRMAN: After the officer left, people started leaving, carrying beer bottles, another sore point

with neighbors who can't understand why police have failed to stop this type of activity here.

Now, here's where things really start to get interesting. At 3:57, car 35 told the police radio to hold him out at headquarters for paperwork. Now, remember that number 35. You're going to see it in just a moment.

Meanwhile, at 4:04, car 39 arrives back on American Street and the officer reenters the club, once again without informing police radio of his presence here. The Police Department told us that this officer stated on his official patrol log that he was at another location in the Third District at this time.

At 4:11, the officer in car 39 leaves the club and drives away. All the patrons have left, and the club appears to be closed for the night. But then car 35 drives up. Remember, according to his call to police radio, he's at headquarters doing paperwork. Car 35 slowly backs up, looks over the street and drives off.

(Demonstration)

MR. BOHRMAN: Seven minutes later, car 35 reappears outside the club, and the officer hurries inside. As far as police radio knows, car 35 is still out at headquarters doing paperwork. Well, the only paperwork we saw him doing was carrying this envelope out of the club less than a minute after he went in. That officer is Patrolman James Coughlin.

MR. BOHRMAN: We wanted to ask Officer Coughlin about the events of October the 11th, so we sent I-Team reporter John Toth to interview him last week, but Officer Coughlin didn't want to answer any of our questions.

MR. TOTH: Can I ask you a few questions, sir?

MR. COUGHLIN: I want to know what — what's this about?

MR. TOTH: Well, I wanted to ask you that on October 11, 1981, you were in car 35, and did you make out a 48 report about vandalism over at the Ukrainian Club at about a quarter after 12?

Greg, don't go up the steps.

MR. COUGHLIN: What's you name?

MR. TOTH: Pardon me, sir?

MR. COUGHLIN: Let me — let me — Let me get your name, will you?

MR. TOTH: Sure.

MR. COUGHLIN: This — this here is harassment.

MR. TOTH: Sir, can you tell us if you went into headquarters to do paperwork that night at about 4:00, October 11th?

MR. COUGHLIN: (No response.)

MR. BOHRMAN: We wanted to ask Officer Coughlin about the vandalism incident at the Ukrainian Club early on the morning of October the 11th, because his name is on the official report of that incident.

In fact, according to the report called a 48, and the official patrol log of car 35, Officer Coughlin was in car 35 for the entire midnight to 8:00 a.m. shift on that day.

Well, our hidden I-Team camera was on American Street at 12:50 that morning when car 35 showed up to handle the vandalism complaint from the club. And the problem is, is that the officer who handled this call does not appear to be Officer Coughlin. Whoever this officer is, he did not appear to be familiar with car 35. For example, it took him four tries to find the right key to start the car when he was leaving.

We can't explain all this, nor can we explain why Officer Coughlin was not equipped for street patrol when

he arrived at the club at 4:17 that morning. You'll notice, he has no nightstick, no uniform jacket and no hat when he shows up here, all standard items officers on patrol are required to have.

We should also note that the Police Department says the official patrol log for car 35 contains an unexplained gap between 4:00 and 4:20 a.m., the very 20-minute period during which we saw Officer Coughlin here on American Street. And we should note again here, car 35 had told the police radio at 3:57 a.m. that he was at headquarters doing paperwork.

(Demonstration)

EXCERPT FROM BROADCAST OF FEBRUARY 18, 1982, 6:00 P.M.

MR. BOHRMAN: Using our hidden I-Team camera, we showed how some police officers were appearing at the club at 610 South American Street, but doing little or nothing about apparent violations in the liquor laws there. We also reported that the activity we saw was similar to questionable police activity observed in 1974 by the Pennsylvania Crime Commission in its investigation of police conduct at social clubs in the City.

Today I-Team manager Tony Lame talked to one of the lawyers who supervised that investigation. Agents working for attorney Barbara Bailey back in the early 1970's had observed police activity in a number of clubs and concluded that many officers were engaged in what the Commission called, "a sham performance of their duty to enforce the 3:00 a.m. closing hour." That's the same complaint the residents of American Street had about the police on their block in 1981.

We asked Ms. Bailey to view our report and compare the video we shot with the actions her agents saw almost ten years ago.

MS. BAILEY: The pattern of activity was precisely the same that we observed in 19— basically 1972 through '74.

MR. BOHRMAN: We then showed her the video tape we shot on American Street early October the 11th last year. That morning, an officer in car 35 told police radio he was at headquarters doing paperwork and then showed up on American Street and picked up an envelope at the club.

MS. BAILEY: I'm a lawyer, so I have to analyze it as a lawyer. And what I've seen is a man saying he's in point A, when he is indeed in point B, which immediately raises my suspicion.

You have him drive up and sort of check out the location, which is what people often do to make sure they're not being watched. He then comes back and he gets out in his shirt sleeves. That's important because policemen are trained, and they do it absolutely automatically, to have on a hat and coat and a nightstick, or whatever other weapon they have in their possession when they go up to investigate a complaint or to conduct some official business.

All that leads me to believe that he was not involved in official business when he went in.

MR. BOHRMAN: We wanted to ask that officer what was in that envelope, but he wouldn't talk to us when we tried to interview him last week.

MR. TOTH: Sir, can you tell us if you went into headquarters to do paperwork that night at about 4:00, October 11th?

(Demonstration)

EXCERPT FROM BROADCAST OF FEBRUARY 19, 1982

* * *

MR. BOHRMAN: All right. I'd like to shift gears, if I may, for just a moment. I'd like to talk about the Police Department and Tom Garvey, who is the President of the Fraternal Order of Police, is here.

Tom, what appears to be some very strange activities by certain members of the Police Department was taking place between the hours of 3:00 and 4:17 on a few mornings. Can you explain to me what those officers were doing?

MR. GARVEY: Well, first of all, let me explain that I deal in evidence. I have to see what evidence is and what evidence does and how concrete it is. And based on what you've shown so far, I'll have to say either most people are watching Dallas or they're wondering what happened to McClain's Law.

MR. BOHRMAN: Be that as it may —

MR. GARVEY: Let me finish my statement. You asked me, and I'll reply.

MR. BOHRMAN: All right.

MR. GARVEY: You made the statement that you must know something about liquor laws. Now, I would hope that you do know that police in the City of Philadelphia cannot remove anyone from a private club. We're not, by law, allowed to. They're allowed to stay in any club as long as they're members.

All we can do is, if we see sales, is arrest the bartender. They can stay there all night, as long as they want. They can bring in a case of liquor, as members, and stay there all night. They have that right.

What appears to me has happened here, very honestly, is some very affluent members of the Society Hill neighborhood got in touch with the District Attorney's office and the Governor's office and made certain things happen that the I-Team got involved with.

But if you were going to ask me what wrongdoing whatsoever took place by police, the answer on what you showed here is zero.

MR. BOHRMAN: Well, let me deal with one specific. We saw two instances where police officers went by people who were obviously inebriated, making noise between 3:00 and 4:00 in the morning, and they didn't so much as ask them to be quiet and to move on; they walked right by them, and one was holding a beer bottle at the time.

MR. GARVEY: What you showed was clips. And I would love, I hope you would turn over to our Department, the entire film.

You mentioned one year you worked on this. Yet, you show three to four nights of split clips, not the entire film.

But, understand, there are 372 clubs in the City of Philadelphia, 2900 liquor licenses. In that district alone, at that particular workshift, there may have been 13 vehicles. So if all 13 vehicles went to check a private club, not only the neighbors on American — their street, or any district, or any other street in that district, there was no police coverage if they were just checking clubs.

My opinion is that there's one heck of a lot more serious things going on than a noisy club. And every house that lets out a private party would, in all likelihood, it would be just as noisy.

MR. BOHRMAN: So who do you think should be doing the club checks, if the police shouldn't be doing it?

MR. GARVEY: I think it could be the Liquor Control; it could be a combination. But the manpower may not be there for either.

Then it comes down to Government to provide the funds to do it.

MR. LAME: Let me just jump in here one minute.

Mr. Garvey, I think that's a very serious question, and that is, do you think the Police Department should be tying up its manpower doing club checks in the first place?

Let's — let's be realistic. The Crime Commission looked at this once before. They said this was a situation that was ripe for corruption. It's — it's a situation that takes the officers off the street, out of patrol, where I'm sure most people would rather have them.

And I think what we're trying to get at here is how can the various government agencies solve the problems that the people on American Street had and the three or 400 other people who have called this station since this piece went on.

We're not particularly interested in saying that two or three police officers didn't do their job. That's not really what this is all about. The question of — what we're really trying to get at here is how do we solve the problems of the people in these various neighborhoods.

MR. GARVEY: Well, I think, again, it's priorities. And you deal with a situation of economics, as the Senator does and City Government does.

And our priorities are a 26 percent increase in crime, none of which was touched on this subject. So our priorities are reducing crime, which none of this touches on.

Do we like doing club checks? I'm sure we'd prefer to be out looking for burglars. Do we like covering school crossings? No. I prefer to go out and look for the most serious crime.

So the answer is, in an economic situation where the money is not available, we perform to the best of our ability. And I think that film shows it.

MR. BOHRMAN: Mr. Garvey, obviously, you seem to think nothing was done wrong by the police in what you saw, and everything seems to be pretty much on the up-and-up.

However, we have spoken with Police Commissioner Solomon's office, and we also have spoken with District Attorney Ed Rendell, and they are both extremely concerned about what we have shown on television. They are concerned about the police activity we saw.

Now, are you going to just say that that's — that nothing happened, that it's — in a cavalier way, that it is just simply benign, nothing?

MR. GARVEY: No. Let me say that what you've shown in my eyes says they did nothing wrong.

I'll cover just one incident where you characterize — characterize, by innuendo, a certain officer who come out of the club with what you portrayed as an envelope.

Let me tell you about that officer. That officer was the first night he ever worked 12:00 to 8:00. He was a rookie. He come off a funeral leave where his father died.

The dress that night was optional, and you said he was without proper uniform. It was optional. He was wearing what was proper for that night.

That officer had a 48 book in his hand, not an envelope as the characterization was. That officer worked that sector for the first time that night, didn't know

where the club was. So that officer, in all rightfulness, was right in what he did. But the characterization was the opposite.

MR. BOHRMAN: What about the alleged falsification of the official police records by some of these officers? We have seen some of the actual records, sir.

MR. GARVEY: The allegation may be made. That officer, I'm sure, will be able to explain that log. But he's not had that opportunity.

MR. LAME: Mr. Garvey, let me ask you one other question, since we're talking about this.

On at least one occasion when we were in the club and they were serving drinks there after hours, an officer went in, he came out, he filed a report saying nothing unusual was going on.

We've talked to the Liquor Control Board. They say their file on this club shows not one single report from the Philadelphia Police Department indicating any violations at all of the liquor laws at this club. I would say that the people who live on American Street find that hard to understand.

MR. GARVEY: I would say, very honestly, you're right. There are a lot of clubs that serve drinks after the officer leaves. They may reopen. Because we don't have the manpower to have them stay in there from 3:00 until 4:00 to make sure that everyone leaves, and we can't force them to leave.

So you're right, and she's right. They may, in fact, serve after the officer leaves. But that is not a priority, trying to get clubs to get rid of people.

* * *

SUPREME COURT OF THE UNITED STATES

JAMES COUGHLIN ET UX. *v.* WESTINGHOUSE BROADCASTING AND CABLE, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85–1593. Decided June 16, 1986

The petition for a writ of certiorari is denied.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting from the denial of certiorari.

In *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. ——, —— (1985) (BURGER, C. J., concurring), I wrote to express my agreement with JUSTICE WHITE that *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), should be reexamined. Petitioner in this petition asks this Court for such a reconsideration. I dissent from the Court's refusal to grant certiorari and give plenary attention to this important issue.

Respondent conducted an investigation into the alleged failure of Philadelphia police to enforce state liquor laws against an "after hours" bar. In the course of that investigation, they hid a camera across the street from the bar and videotaped police officers entered and leaving the bar. Respondent ultimately broadcast a videotape of petitioner leaving a bar on October 11, 1981. The videotape stated that "the only paperwork we saw [petitioner] doing was *carrying this envelope* out of the Club less than a minute after he went in." A freeze frame with a circle around an object in petitioner's hand was used to emphasize the point. The announcer went on to say that officer had difficulty finding the proper key to start his patrol car and that he was not wearing his uniform jacket or hat, "all standard items officers on patrol are required to have." The clear implication of the broadcast was that petitioner had accepted a bribe.

Respondent made no attempt to obtain petitioner's explanation for these events other than an "ambush" interview four months after the fact. In this "interview," a reporter for respondent approached petitioner with cameras whirling as he came off of his all-night shift and asked what he had been doing four months earlier on the night of October 11, 1981. Petitioner said "this here is harassment" and declined to answer questions at that time.

Petitioner filed a libel suit in District Court. He alleged that even a minimal investigation of the events of that evening would have revealed that he was a rookie policeman, patrolling alone for the first time on October 11, 1981; that early in his shift, he was ordered to investigate a vandalism complaint at the bar; that after talking to the bar's stewart, he returned to the patrol car and filled out his incident report book; and that he was not required to wear his jacket or hat while on patrol. Petitioner further alleged that the purported "envelope" was in fact nothing other than his incident report book. The District Court concluded that petitioner had raised a genuine issue of material fact concerning the truth of the allegedly defamatory statements and that the broadcast was capable of a defamatory interpretation. Applying our decision in *New York Times* v. *Sullivan*, however, the District Court concluded that petitioner had not introduced sufficient evidence of "actual malice" on the part of respondent to withstand a motion for summary judgment. The Court of Appeals affirmed, concluding that the District Court had properly evaluated petitioner's evidence of actual malice. One judge concurred, observing that "[t]he *New York Times* standard makes it hard enough for a public figure to win a libel suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media." 780 F. 2d 340, 349 (Becker, J., concurring).

Petitioner has raised an important federal question that we should review. He has been accused of accepting a bribe on the basis of a cursory investigation, yet his libel suit to clear

his name has been found to be constitutionally barred. The District Court observed that "[a]n issue exists . . . as to whether [respondents], with a minimum of effort, could have discovered the truth. The Supreme Court's mandate, however, is clear: 'reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.'" 603 F. Supp. 377, 388 (quoting *St. Amant* v. *Thompson*, 390 U. S. 727, 730 (1968)). I would grant certiorari and set this case for argument to determine whether the Court's "mandate" remains an appropriate one.